No. 89-7260-CFY
Status: GRANTED

Title: William J. Burns, Petitioner
v.
United States

Docketed:
April 19, 1990

Court: United States Court of Appeals for the District of Columbia Circuit

Counsel for petitioner: Goldblatt,Steven H.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Apr 19 1990	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	May 22 1990		Order extending time to file response to petition until June 23, 1990.
5	Jun 11 1990		Brief of respondent United States in opposition filed.
6	Jun 13 1990		DISTRIBUTED. June 27, 1990
7	Jun 20 1990	X	Reply brief of petitioner William J. Burns filed.
9	Jun 28 1990		Petition GRANTED.
			**********
10	Jul 24 1990		Joint appendix filed.
11	Aug 13 1990		Brief of petitioner William J. Burns filed.
12	Sep 10 1990		Record filed.
		*	District of Columbia Court of Appeals-one vol.
13	Sep 12 1990		Brief of respondent United States filed.
14	Sep 26 1990		CIRCULATED.
15	Oct 12 1990	X	Reply brief of petitioner William J. Burns filed.
16	Oct 19 1990		SET FOR ARGUMENT MONDAY, DECEMBER 3, 1990. (1ST CASE)
17	Dec 3 1990		ARGUED.

89-7260 (8)

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM J. BURNS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The petitioner, William J. Burns, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit without prepayment of costs pursuant to Rule 39 of the Rules of the Supreme Court.

The United States District Court for the District of Columbia Circuit granted Mr. Burns In Forma Pauperis status on November 29, 1988, and the United States Court of Appeals for the District of Columbia Circuit appointed counsel pursuant to the Criminal Justice Act of 1964 on February 14, 1989.

Respectfully submitted,

STEVEN H. GOLDBLATT
Attorney for Petitioner
Counsel of Record
Director

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22pp

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that one (1) copy of the foregoing Motion For Leave To Proceed In Forma Pauperis was mailed, postage prepaid, to counsel for Respondent, J. Douglas Wilson, Esquire, Appellate Section, Criminal Division, United States Department of Justice, Post Office Box 899, Ben Franklin Station, Washington, D.C. 20044 on this 19th day of April, 1990.

STEVEN H. GOLDBLATT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that one (1) copy of the foregoing Motion For Leave To Proceed In Forma Pauperis was mailed, postage prepaid, to: Kenneth W. Starr, Esquire, Solicitor General of the United States, Department of Justice, 10th Street and Constitution Avenue, N.W., Room 5143, Washington, D.C. 20530 on this 19th day of April, 1990.

STEVEN H. GOLDBLATT

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

WILLIAM J. BURNS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STEVEN H. GOLDBLATT
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Counsel of Record
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QUESTION PRESENTED

Whether a judge may impose a sentence that departs from the applicable guideline range of the Federal Sentencing Guidelines without giving the defendant notice of, and an opportunity to respond to, the intended departure and the factors on which the departure is based?

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

WILLIAM J. BURNS,
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v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, entered January 12, 1990, is reported at 893 F.2d 1343, and is reprinted in Appendix A, filed with this petition, at pp. 1-6. The order of the United States District Court for the District of Columbia, entered October 14, 1988, is an unpublished opinion, Crim. No. 88-0302 (D.D.C. October 14, 1988), and is reprinted in Appendix A at pp. 8-12.

JURISDICTION

On October 14, 1988, the District Court for the District of Columbia sentenced Mr. Burns to 60 months in federal prison. The district court's jurisdiction was based upon 18 U.S.C. §§ 3231

and 3551 (1988). The district court's order was affirmed by a panel of the United States Court of Appeals for the District of Columbia Circuit in an opinion entered on January 12, 1990. See United States v. Burns, 893 F.2d 1343 (D.C. Cir. 1990). The circuit court had jurisdiction over the appeal from final judgment under 28 U.S.C. § 1291 (1988) and 18 U.S.C. § 3742 (1988). Mr. Burns' petition for rehearing or rehearing en banc was denied on March 15, 1990.

The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the District of Columbia Circuit is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTES, GUIDELINES, AND RULES INVOLVED

The full text of the following relevant statutes, guidelines, and rules are contained in Appendix B, filed with this petition:

1. Fed. R. Crim. P. 32;
2. United States Sentencing Commission, Guidelines Manual, § 6A1.3 (June 1988);
3. United States Sentencing Commission, Guidelines Manual, Ch.6 Pt.6 intro. comment (June 1988);
4. 18 U.S.C. § 3553 (1988).

STATEMENT OF THE CASE

This petition for certiorari arises from William J. Burns' sentencing by the United States District Court for the District of Columbia under the Federal Sentencing Guidelines. The

district court's jurisdiction was based upon 18 U.S.C. §§ 3231 and 3551 (1988). Burns pleaded guilty to theft of government funds, in violation of 18 U.S.C. § 641 (1988), making false claims against the government, in violation of 18 U.S.C. § 287 (1988), and attempting to evade income tax, in violation of 26 U.S.C. § 7201 (1988). (App. A at 13).[1]

On October 14, 1988, Judge Norma Holloway Johnson sentenced him to 60 months of incarceration, (App. A at 13-14), noting her upward departure from the applicable sentencing guideline range of 30-37 months. (App. A at 8-12). Burns appealed that departure from the applicable sentencing guideline range, (App. A at 2), claiming, inter alia, that he was entitled to notice of, and an opportunity to respond to, the district court's intention to depart from the applicable guideline range. Id. The Court of Appeals for the District of Columbia Circuit affirmed the sentence, (App. A at 1-7), and denied Burns' petition for panel rehearing and suggestion for rehearing en banc. (App. A at 16-17).

Burns was employed by the United States Agency for International Development ("AID") from 1967 to July, 1988. (App. C at 11). At the time of his arrest, he was a supervisor in the

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[1] For the purposes of this petition, citations to "App. A" refer to Appendix A, which contains the opinions and orders of the lower courts in this case, citations to "App. B" refer to Appendix B, which contains the full text of relevant statutes, guidelines, and rules, and citations to "App. C" refer to Appendix C, which contains other relevant documents from the record in this case. All three appendices are bound together and were filed with this petition.

agency's Financial Management Section, id., and as a certifying officer was authorized to order the Treasury to make payments to vendors on the agency's behalf. (App. C at 2). AID officials conducted a routine background check required to maintain Burns' security clearance in December, 1987. (App C at 6). They became suspicious of Burns when they learned that his home was valued at over $400,000, because his income was $35,108. Id. The officials then conducted a credit check on Burns, and an investigation of his banking records. Id. Those records and a subsequent internal investigation revealed that Burns had diverted funds for his own use from an unused travel fund at AID. (App. C at 26).

From February 25, 1982, through May 26, 1988, Burns prepared false authorization forms for payments in the name of Vincent Kaufman, and submitted the forms to the United States Treasury. (App. C at 2). The forms instructed the Treasury Department to draw a check on an account allocated to AID, and send the check to the Signet Bank to be deposited in the name of Vincent Kaufman. Id. The Kaufman account was, in fact, Burns' account, and Burns withdrew money from the account for his personal use. Id. Over the six year period, the Treasury issued 53 such checks in response to Burns' fraudulent applications. (App. A at 9-11, App. C at 28). The total amount of the theft was $1,261,184.92, (App. C at 7), and Burns' outstanding tax obligation on this unreported income is $475,685. Id. After the agency investigation uncovered Burns' fraud, he submitted two additional

fraudulent forms to the Treasury, which, though never paid, constituted false claims against the government. (App. C at 2-3). He was arrested on July 12, 1988. (App. C at 1).

Burns negotiated a plea agreement with the Justice Department, in which he agreed to waive indictment and plead guilty to one count of theft of government funds, 18 U.S.C. § 641, one count of false claims, 18 U.S.C. § 287, and one count of attempting to evade income tax. 26 U.S.C. § 7201. (App. C at 15-17). He also agreed to cooperate with the government by submitting to debriefings regarding the money he obtained from the travel fund. (App. C at 16). Burns and his wife, Kathy Burns, agreed to make restitution by surrendering substantially all of their assets to the government. Id. Burns also cooperated fully with government authorities in identifying the property and money recoverable by the government. (App. C at 7). Under the plea and restitution agreements, (App. C at 15-17, 19-25), the government should receive between $600,000 and $700,000 from the transfer of that money and property. (App. C at 12).[2] Burns further agreed to surrender to the government 50% of any income he earns over $40,000, and 100% of any income he earns over $70,000, until he has repaid in full all money he obtained

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[2] Mrs. Burns was permitted to retain the following: 1) property and funds that she could establish were not acquired directly from her husband or obtained with funds acquired from him, 2) one automobile, 3) $10,000 in funds, less any property and funds retained because they were not acquired directly or indirectly from her husband, and 4) necessary household items, one wedding and engagement ring set, and wedding gifts. (App. 17).

from the agency's travel fund. (App. C at 22-23). The restitution agreement also divested Burns of all claim to his $30,286 retirement fund. (App. C at 24). Finally, nothing in the plea or restitution agreements affects Burns' civil tax liability. (App. C at 17, 24).

The plea agreement noted that all parties "understood" that the case would be covered by the Sentencing Guidelines, and that each party "assumed that a sentencing range of Level 19, Criminal History Category I," would determine the sentence, i.e., would allow the judge a range of 30-37 months. (App. C at 15). In the presentence report, the probation officer also concluded that the applicable guideline sentencing range was 30 to 37 months. (App. C at 9). The probation officer concluded that the case involved "no factors that would warrant departure from the guideline sentence." (App. C at 13). Both Burns and the government reviewed the presentence report, and neither filed an objection. (App. C at 14).

At the sentencing hearing, after hearing from counsel and briefly from Burns, Judge Johnson agreed with the probation officer and with the parties that "[t]he guidelines which apply to this case do indeed reflect that the appropriate sentence is within the range of 30 to 37 months." (App. C at 27). However, the Judge went on to state that "the appropriate sentence can only be effected if the court departs from the guidelines." Id. She found that three factors were involved in the offense "which [she] [felt] the guidelines either fail to address or to consider

adequately." (App. C at 28). The court's findings with regard to those factors were that: 1) "the Guidelines, in considering the severity of the offenses, do not sufficiently weigh the duration of defendant's criminal activity," (App. C at 28); 2) Burns "disrupted the functions of government," (App. C at 30); and 3) "[b]y continually evading the payment of . . . taxes, [Burns] conceal[ed] crimes of theft and false claims." (App. C at 31). Judge Johnson then stated that:

> The court relies upon its own judgment and experience and finds that the guideline range for the offenses which you committed must be departed from.
>
> Pursuant to the Sentencing Reform Act of 1984, Mr. Burns, it is the judgment of this court that you shall be committed to the custody of the Bureau of Prisons for a term of 60 months.

(App. C at 31). The Judge also sentenced Burns to three years of supervised release following his 60 month incarceration, and to 100 hours of community service per year for each of the three years of the supervised release. (App. C at 31-32). After noting that Burns had agreed to a restitution agreement with the government, Judge Johnson informed him of his right to appeal and to appointed counsel, then ordered him to step back with the marshal. (App. C at 33).

Mr. Burns' petition to this Court follows the District of Columbia Circuit's affirmance of his sentence, (App. A at 1-7), and its denial of his petition for rehearing and suggestion for rehearing en banc. (App. A at 16-17).

REASONS FOR GRANTING THE WRIT

Introduction

The panel opinion in United States v. Burns, 893 F.2d 1343 (D.C. Cir. 1990), presents an important issue on which this Court should grant a writ of certiorari. The panel rejected Mr. Burns' argument that, prior to sentencing, a defendant must receive notice of, and an opportunity to respond to, a district court judge's intention to depart from the guideline range applicable under the Federal Sentencing Guidelines. See United States Sentencing Commission, Guidelines Manual, ("U.S.S.G.") (June 1988). In so doing, the panel misapprehended the requirements of Fed. R. Crim. P. 32 and U.S.S.G. § 6A1.3 and thereby placed the District of Columbia Circuit into direct conflict with the three Circuits that have previously ruled that such notice is required. Burns, 893 F.2d at 1348.[3] For this reason, this Court should grant a writ of certiorari in this case.

> **THE PANEL OF THE DISTRICT OF COLUMBIA CIRCUIT HELD THAT A DEFENDANT IS NOT ENTITLED TO ADEQUATE NOTICE AND A MEANINGFUL OPPORTUNITY TO BE HEARD CONCERNING FACTORS FOR AN UPWARD DEPARTURE, THEREBY PLACING THE DISTRICT OF COLUMBIA CIRCUIT IN CONFLICT WITH THREE OTHER CIRCUITS AND MISAPPREHENDING FED. R. CRIM. P. 32 AND U.S.S.G. § 6A1.3.**

The panel's conclusion that a notice requirement "is not

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[3] See United States v. Otero, 868 F.2d 1412, 1415 (5th Cir. 1989); United States v. Nuno-Para, 877 F.2d 1409, 1415 (9th Cir. 1989); United States v. Cervantes, 878 F.2d 50, 55 (2d Cir. 1989); see also United States v. Palta, 880 F.2d 636, 640 (2d Cir. 1989).

contemplated by Rule 32," Burns, 893 F.2d at 1348, misapprehends Fed. R. Crim. P. 32 and rejects the interpretation of three other Circuits. Id. at 1348. Under Rule 32, counsel must have an opportunity at the sentencing hearing, "to comment upon the probation officer's determination and on other matters relating to the appropriate sentence." Fed. R. Crim. P. 32(a)(1) (emphasis added). Three Circuits have held that "other matters relating to the appropriate sentence" include both the court's intention to depart from the applicable guideline range and the factors and circumstances that underlie the intended departure. See Otero, 868 F.2d at 1415; Nuno-Para, 877 F.2d at 1415; Palta, 880 F.2d at 640. Therefore, where a presentence report does not give a defendant notice of a potential departure,[4] but the judge intends to depart, "the court must advise the defendant that it is considering departure based on a particular factor and allow defense counsel an opportunity to comment." Nuno-Para, 877 F.2d at 1415. If counsel has no such opportunity, "the purpose of Rule 32(c), to ensure the accuracy of sentencing information, would be defeated." Otero, 868 F.2d at 1415.[5]

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[4] Under Rule 32 the probation officer must explain in the presentence report "any factors that may indicate that a sentence of a different kind or of a different length from one within the applicable guideline would be more appropriate under all the circumstances." Fed. R. Crim. P. 32(c)(2)(B).

[5] Given that Congress has mandated these defendants' rights to challenge matters related to the appropriate sentence, Fed. R. Crim. P. 32(a)(1), the court's deprivation of Burns' right to this challenge constituted a violation of procedural Due Process. See United States v. Romano, 825 F.2d 725, 728 (2d Cir. 1987). That the amount of process due a defendant to protect this right must include adequate notice of and a meaningful opportunity to

While the opinion below correctly notes that requiring district courts to give this type of notice to defendants would constitute a deviation from pre-Guidelines practice, see Burns, 893 F.2d at 1348, it overlooks the Commission's initiation of this type of change. See U.S.S.G. § 6A1.3, comment.

> In current practice factors relevant to sentencing are often determined in an informal fashion . . . this situation will no longer exist under the Sentencing Guidelines. The court's resolution of disputed factors will usually have a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair []. . . . When a reasonable dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information.

Id. (emphasis added). Part of this new formality must include a meaningful opportunity for the defendant to challenge disputed factors regarding a court's reasons for considering departure, because resolution of such disputes helps to ensure the fairness, accuracy, and uniformity of sentencing. See U.S.S.G. Ch.6, Pt.6, intro. comment ("[r]eliable fact finding is essential to due process and to the accuracy and uniformity of sentencing");

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respond to the court's intention to depart, is clear from an application of the four part balancing test of Mathews v. Eldridge, 424 U.S. 319, 335 (1976). See Romano, 825 F.2d at 728 (applying Mathews test to determine process due at sentencing hearing); United States v. Pugliese, 805 F.2d 1117, 1122 (2d Cir. 1986) (same). First, the defendant's liberty interest is clearly quite strong. Further, the risk of error associated with the procedure used in this case and the value of allowing defendants to challenge sentencing information are both recognized by the Rule 32 and Guideline § 6A1.3 provisions for testing the accuracy of sentencing information. Finally, because resolution of the disputed factors below will afford greater accuracy in sentencing, the government's fiscal interest would be served by more efficient, and probably fewer, appeals.

United States v. Burch, 873 F.2d 765, 767 (5th Cir. 1989) (sentencing court failed to comply with Rule 32(c) and § 6A1.3 by not resolving defendant's factual disputes regarding presentence report).

The extent of the new procedures for resolution of disputed sentencing factors that the Sentencing Commission embodied in § 6A1.3 indicates that the Commission anticipated the notice requirement that three Circuits have upheld. See Otero, 868 F.2d at 1415; Nuno-Para, 877 F.2d at 1415; Palta, 880 F.2d at 640.

> The court shall resolve disputed sentencing factors in accordance with Rule 32(a)(1), . . . notify the parties of its tentative findings and provide a reasonable opportunity for the submission of oral or written objections before imposition of sentence.
>
> . . . .
>
> Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues.

U.S.S.G. § 6A1.3, p.s.; U.S.S.G. § 6A1.3 comment. See also Otero, 868 F.2d at 1415 (remanding for a hearing regarding purity of cocaine). Once the parties receive notice of a judge's intention to depart, a judge should resolve any dispute over the factors underlying the intended departure by following these Guideline procedures. The panel opinion rejects this type of presentence procedure as a means to address a judge's intent to depart because it would be a "cumbersome burden on trial judges." Burns, 893 F.2d at 1348. However, § 6A1.3 emphasizes the importance of resolution of disputed factors prior to sentencing, and obligates judges to take steps necessary to that end.

Further, in terms of judicial economy, any "cumbersome" nature of this type of proceeding pales in comparison to the inefficiency of unnecessary appellate review and potential remands for resolution of disputed factors.

The panel opinion also notes that because Burns had an opportunity for allocution and appeal, "he has not been harmed by the trial court's lack of notice." Burns, 893 F.2d at 1348. This view overlooks both the express intention of the Sentencing Commission that any disputed sentencing factor be resolved by the district court before sentencing, U.S.S.G. § 6A1.3, and the limitations on relief available that appellate standards of review necessarily impose. First, in allocution, counsel can only challenge the factors on which a defendant's sentence is based if he or she knows of that basis, i.e., of any intent the judge has to depart and the grounds for that departure. The mere fact that the information on which the court relied as a basis for upward departure was present in the presentence report, see Burns, 893 F.2d 1348, neither satisfies the Rule 32 requirements nor allows defendants to protect themselves through allocution. "Rather, such information . . . must be identified as a basis for departure in the presentence report," or the judge must provide the defendant with reasonable notice of that information. Nuno-Para, 877 F.2d at 1415.

Second, only if a Court of Appeals were to review de novo the facts underlying the factors upon which departure is based, as well as the factors themselves, and then exercise the broad

discretion of a sentencing court in evaluating the length of the sentence, 18 U.S.C. § 3553 (1988), could the defendant's right to appeal the district court's departure afford the same opportunity to challenge the grounds for departure lost in the district court. Contrary to the panel opinion's assertion, Burns, 893 F.2d at 1348, Burns disputes facts underlying the departure in this case. Specifically, he disputes that his actions resulted in the disruption of a governmental function. (App. C at 34-43). On appeal he was unable to challenge the factual basis in the record for departure on that ground in the same way that he could during a presentence procedure. Under the panel's rule, disputes like this one will remain unresolved on appeal, preventing the Court of Appeals from "gaug[ing] either the need for or reasonableness of the departure." Burch, 873 F.2d at 767.

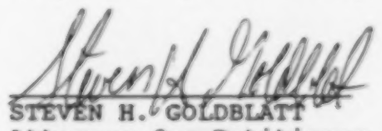
The District of Columbia Circuit has established a rule that fails to advance the purposes of the Federal Rules of Criminal Procedure, ignores the changes in sentencing procedure instituted by the Sentencing Guidelines and thereby violates defendants' rights to procedural Due Process. See supra note 5. The Circuit's justifications for its rule, i.e., that any new proceeding would be cumbersome and that the defendants' opportunities for allocution and appeal are sufficient opportunities to challenge any departure from an applicable guideline range, fail to cure the harm done to defendants. The

Second, Fifth, and Ninth Circuits[6] have, contrary to the District of Columbia Circuit, established departure notification rules that fulfill the purposes of the Federal Rules of Criminal Procedure and the Sentencing Guidelines, and protect defendants' procedural Due Process rights. This Court should resolve this split in the Circuits so that all federal defendants will receive the same protections when district judges intend to depart from an applicable guideline range.

CONCLUSION

The petitioner respectfully requests that this Court grant the writ of certiorari and review the decision of the District of Columbia Circuit in this case.

Respectfully submitted,



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[6] See United States v. Otero, 868 F.2d 1412, 1415 (5th Cir. 1989); United States v. Nuno-Para, 877 F.2d 1409, 1415 (9th Cir. 1989); United States v. Cervantes, 878 F.2d 50, 55 (2d Cir. 1989); see also United States v. Palta, 880 F.2d 636, 640 (2d Cir. 1989).

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EDITOR'S NOTE

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No. (3)

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

WILLIAM J. BURNS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
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APPENDICES

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APPENDIX A

) VOLUME

earing en banc.

earing en banc.

678, June 9, 1989

.A.10 (Okl.)

UNITED STATES of America

v.

William J. BURNS.

No. 88-3161.

United States Court of Appeals,
District of Columbia Circuit.

Argued Nov. 16, 1989.

Decided Jan. 12, 1990.

Defendant pled guilty to theft of government funds, making false claim against the Government, and income tax evasion and was sentenced by the United States District Court for the District of Columbia, Norma Holloway Johnson, J. Defendant appealed. The Court of Appeals, Mikva, Circuit Judge, held that: (1) there were valid reasons for departure from Sentencing Guidelines in that the income tax evasion was to conceal the other crimes, duration of the crimes extended over six years, in crimes resulted in disruption of government functions; (2) a sentence of 60 months, which was a 23-month departure, was not unreasonable; (3) trial court was not required to give notice of intent to depart from the Guidelines; but (4) it would be appropriate for prosecutors to modify plea bargain agreement language to make clear that bargain either contemplates trial judge exercising her enhancement powers or allows defendant to withdraw plea if trial judge contemplates enhancement.

Affirmed.

1. Criminal Law ⇐1134(1), 1147

District court's determination of whether a certain factor was not adequately considered by Sentencing Commission in formulating the Guidelines, so that it may be basis for departure, is subject to plenary review, but once it is established that a factor is a legally permissible basis for departure, Court of Appeals gives broad deference to district court's judgment as to the appropriateness of considering the factor, and will uphold the departure so long as it is reasonable. 18 U.S.C.A. §§ 3553(b), 3742(e)(4); U.S.S.G. § 5K2.0, p.s., 18 U.S.C.A.App.

2. Criminal Law ⇐1208.6(4)

That tax evasion was engaged in an order to conceal embezzlement scheme provided basis for upward departure from Sentencing Guidelines; concealment of theft and false claims against the Government through income tax evasion was not a factor that had already been considered within the Guidelines under the adjustment for "more than minimal planning." U.S.S.G. §§ 2B1.1, 2F1.1, 5K2.9, p.s., 18 U.S.C.A.App.

3. Criminal Law ⇐1208.6(4)

The prolonged and repetitive nature of crime involving theft of government funds and making false claim against the Government, in that there were 53 separate acts of theft over a six-year period, provided basis for upward departure from Sentencing Guidelines and was not subsumed under the "more than minimal planning" adjustment. U.S.S.G. § 1B1.1, comment. (n.1(f)), 18 U.S.C.A.App.

4. Criminal Law ⇐1275

Upward departure from sentencing guidelines for theft of government funds and making false claim against the Government was justified on the basis of disruption of government functions, in that defendant diverted government resources and used federal mechanisms to perpetrate his crimes. U.S.S.G. §§ 5K2.0, p.s., 5K2.7, p.s., 18 U.S.C.A.App.

5. Criminal Law ⇐1275

Sentence of 60 months, which was an upward departure of 23 months from the Sentencing Guidelines, for theft of government funds, making false claim against the Government and income tax evasion was not unreasonable given three departure reasons, in that the tax evasion was to conceal the other crimes, duration of the crime extended over six years, and disruption of government functions was involved. 18 U.S.C.A. §§ 287, 641, 3553(a, b); 26 U.S.C.A. § 7201; U.S.S.G. §§ 5K2.0, p.s., 5K2.7, p.s., 5K2.9, p.s., 18 U.S.C.A.App.

6. Criminal Law ⇐986.1

District court was not required to give defendant notice of intent to depart from Sentencing Guidelines. Fed.Rules Cr.Proc. Rules 32, 32(a)(1), 18 U.S.C.A.; U.S.S.G. §§ 6A1.3, comment., 6A1.3, p.s., 18 U.S.C. A.App.

7. Criminal Law ⇐273.1(2)

It would be appropriate for prosecutors to modify plea bargain agreement language to make clear that bargain either contemplates the trial judge exercising her enhancement powers, to depart from Guidelines suggested sentencing range, or allows defendant to withdraw his plea if trial judge contemplates enhancement.

Appeal from the United States District Court for the District of Columbia.

Maureen DelDuca, (appointed by this Court as co-counsel), with whom Steven H. Goldblatt, (appointed by the Court), was on the brief, for appellant.

J. Douglas Wilson, Atty., Dept. of Justice, with whom Jay B. Stephens, U.S. Atty., Washington, D.C., was on the brief for appellee.

Before MIKVA, SILBERMAN, and D.H. GINSBURG, Circuit Judges.

Opinion for the Court filed by Circuit Judge MIKVA.

MIKVA, Circuit Judge:

This case requires us to rule on the validity of the trial judge's decision to depart from the sentence range contemplated in the Federal Sentencing Guidelines. The defendant, William J. Burns, pled guilty to theft of government funds, making a false claim against the government, and income tax evasion, crimes for which he expected to receive a sentence of 30 to 37 months in prison pursuant to the applicable Guidelines range. Despite the agreement of the U.S. attorney to the 30-37 month range and the recommendation of Burns' probation officer that Burns receive a sentence within that range, the trial judge found three reasons for an upward departure and sentenced Burns to 60 months in prison. Burns appeals his sentence, contending that the trial judge relied on impermissible grounds in enhancing his sentence and that the extent of departure was unreasonable. He also maintains that the Federal Rules of Criminal Procedure and the Guidelines require that he be given advance notice of the judge's intention to depart. Because we find that the trial judge relied on three legitimate grounds for her departure decision and that nothing in the law requires a trial judge to provide advance notice of her intention to depart from the Guidelines, we affirm. As we are troubled by the plea bargaining procedure used in this case, we suggest that future plea agreements explicitly address the possibility that the trial judge may depart from the Guidelines, even if such a departure is not recommended by the government or the probation officer.

I. Background

Burns was employed by the United States Agency for International Development ("AID" or "the agency") from 1967 until 1988. Beginning in February 1982, he used his position as a supervisor in the agency's Financial Management Section to authorize the payment of unused travel funds from the U.S. Treasury to Vincent Kaufman. However, the payments to Kaufman were really a front for diverting government funds to Burns' own pocket. From 1982 to 1988, Burns authorized the issuance of 53 checks totaling in excess of $1,200,000. Burns' scheme was discovered after a routine security check revealed that he owned a $400,000 house despite his annual salary of $35,000. Prior to his arrest, but after the government became aware of his embezzlement activities, Burns authorized the issuance of two checks in the name of Vincent Kaufman; these checks formed the basis for the government's case against Burns on charges of making false claims against the government.

After his arrest, Burns and the government entered into an agreement whereby Burns agreed to plead guilty to theft of government funds in violation of 18 U.S.C. § 641, making a false claim against the government in violation of 18 U.S.C. § 287, and evasion of income tax in violation of 26 U.S.C. § 7201. Burns agreed to surrender all of his assets, except for some minor personal property, and to pay restitution to the government by surrendering 50 percent of all his future annual income over $40,000 and 100 percent of all future annual income over $70,000. He also agreed to cooperate fully with the government in its investigation of the matter. Under the agreement, both parties understood that Burns' plea would be covered by the Sentencing Guidelines and that a sentencing level of 19, Criminal History Category I (30-37 months) would apply to his case.

The probation officer's presentence report also concluded that Burns' sentence would be within the 30-37 month range, and did not recommend that Burns be given a sentence in excess of that prescribed by the Guidelines. At the sentencing hearing, however, Judge Johnson concluded that in order to give Burns an appropriate sentence, the court had to depart from the Guidelines. She noted that according to 18 U.S.C. § 3553(b), the sentencing judge is entitled to depart from the Guidelines in light of aggravating or mitigating circumstances that were not adequately considered by the Sentencing Commission. The trial judge found three factors involved in Burns' case that were not adequately addressed by the Guidelines. First, she found that although the Guidelines permit adjustment for the amount of money stolen and the level of planning, they do not give sufficient weight to the duration of the crime. Because the defendant's fraudulent scheme persisted for six years and involved 53 separate instances, the judge concluded that departure from the Guidelines was warranted.

Additionally, while the Guidelines do consider the defendant's abuse of the public trust, the trial judge found that the defendant's systematic abuse of the government's process of paying legitimate vendors, in addition to violating the public trust, constituted a disruption of government functions. Since § 5K2.7 of the Guidelines permits departure when "the defendant's conduct resulted in the significant disruption of a governmental function," the trial court found this to be a second reason for imposing an enhanced sentence.

Finally, as the Guidelines also permit departure if "the defendant committed the offense in order to facilitate or conceal the commission of another offense," the trial judge concluded that Burns' evasion of over $400,000 in taxes allowed him to conceal his theft and false claims and accordingly justified an upward departure from the Guidelines.

II. Analysis

A. *Standard of Review*

[1] The Sentencing Guidelines provide that a trial judge can depart from the Guidelines based on aggravating or mitigating circumstances which were not adequately considered by the Sentencing Commission in formulating the Guidelines. 18 U.S.C. § 3553(b). If a factor is one which the Commission has already considered, it must be "present to a degree substantially in excess of that which ordinarily is involved in the offense of conviction." Guidelines § 5K2.0, ¶ 2. Determining whether a certain factor is an appropriate ground for enhancement of a sentence involves a question of statutory interpretation. To the extent that this requires us to decide whether the Commission adequately considered that particular factor, we subject the court's determinations to plenary review. *United States v. Diaz-Villafane*, 874 F.2d 43, 49 (1st Cir.1989), *cert. denied*, — U.S. —, 110 S.Ct. 177, 107 L.Ed.2d 133 (1989); *see also United States v. Burke*, 888 F.2d 862, 865 (D.C.Cir.1989). Once it has been established that a factor is a legally permissible basis for departure, we give broad deference to the district court's judgment as to the appropriateness of considering this factor, and we will uphold the departure so long as it is reasonable. 18 U.S.C. § 3742(e)(4). We will only reverse the factual findings that the trial court relied upon in its departure decision

only if they are clearly erroneous. *Diaz-Villafane*, 874 F.2d at 49.

B. *Reasonableness of Departure*

Burns maintains that the trial court erred in departing from the Guidelines. He contends that the concealment and duration factors upon which the trial judge relied in her departure decision had already been contemplated by the Sentencing Commission and thus could not form a separate basis for departure. Burns also argues that the trial court's finding that he significantly disrupted government functions was not supported by the record. He further contends that the degree of departure was unreasonable and that the trial court unfairly failed to give him notice of its intention to depart from the Guidelines. We dispose of each of Burns' arguments in turn.

1. Concealment

[2] Burns maintains that because the Guidelines allow upward adjustment for "more than minimal planning," Guidelines §§ 2B1.1 and 2F1.1, his concealment of his theft and false claims through income tax evasion were factors that had already been considered within the Guidelines and therefore could not provide the basis for departure. Burns contends that since his "more than minimal planning" was not extraordinary, departure was unwarranted.

The trial court's upward departure for concealment, which is permitted under § 5K2.9 of the Guidelines, applied to Burns' tax evasion, and not to the fact that he used other elaborate methods to conceal his crimes. Therefore, while the Guidelines discuss an adjustment for "more than minimal planning" for theft of government funds and false claims, this applies only to the planning of those offenses. Burns' evasion of taxes to conceal his embezzlement scheme constituted a separate basis for an upward departure, distinct from the fact that his activities were well planned. Since it is possible to be guilty of tax evasion without concealing other crimes, we conclude that the trial court's decision to depart based on concealment was reasonable.

2. Duration

[3] Burns argues that duration is also a factor considered by the Commission under the "more than minimal planning" adjustment and therefore cannot provide a separate ground for departure. He notes that the commentary to the Guidelines states that the "more than minimal planning" adjustment applies to "any case involving repeated acts over a period of time." Guidelines § 1B1.1, note 1(f). Therefore, since the Guidelines already so counted for the duration of his crime, and his theft was not highly unusual when compared to others, Burns contends that the departure decision was erroneous.

The trial court, however, specifically stated that her decision to enhance Burns' sentence was based not simply on planning but upon the prolonged and repetitive nature of Burns' crime. According to the Guidelines' commentary, "more than minimal planning means more planning than is typical for commission of the offense in simple form." Guidelines § 1B1.1, note 1(f). The court properly observed that in incorporating a "more than minimal planning" adjustment into the Guidelines, the Commission did not consider "the number of years and the amount of fraudulent transactions ... executed" by a defendant. Burns' crime involved 53 separate acts of theft over a six-year period. The trial judge could reasonably have concluded that the duration of *execution*, then, warranted enhancement. We note that a defendant who persists in his criminal activity over a period of years may deserve a harsher sentence than a defendant whose crime was limited in duration because the former has arguably had more opportunities to renounce his illegal schemes. Accordingly, the trial court's finding that the duration of Burns' crime justified departure, was not dependent upon the amount of planning involved in the crime, and thus was not unreasonable.

3. Disruption of Government Functions

[4] Burns argues that because the record does not indicate that his activities caused any disruption of government functions beyond the disruption which is inherent in the offense, the departure decision was erroneous. He notes that the Commission's policy statement regarding disruption of government functions indicates that "unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference." Guidelines § 5K2.7. Burns argues that because his crime went undetected for six years and the money he stole was a tiny fraction of AID's budget, his activities could not have caused a significant disruption of government functions.

The Guidelines contemplate departure for crimes which significantly disrupt the function of the government. We reject Burns' argument that this was not an appropriate case for such departure. The fact that Burns' crimes went undetected for so long does not indicate that his activities caused little disruption. Rather, the record indicates that he diverted government resources and used federal mechanisms to perpetrate his crimes. Such misuse of the government's vendor payment process is clearly disruptive; it diverts federal resources from legitimate to illegitimate recipients.

Although disruption of government functions is an inherent aspect of crimes such as bribery, the Commission's policy statement indicates that "when the conviction is theft ... and that theft caused disruption of a government function, departure from the applicable guideline more readily would be appropriate." Guidelines § 5K2.0, ¶ 2. In this case, the trial judge found that Burns' misuse of his position resulted in a "disruption of government function" beyond that which naturally accompanies diversion of resources from legitimate to illegitimate recipients. Burns' manipulation of AID procurement apparatus required the unwitting assistance of many government personnel, who were diverted from their legitimate tasks by the demands of his scheme. The record demonstrates that Burns relied upon clerks to prepare forms necessary to divert government funds, and that his checks to "Vincent Kaufman"—issued by the United States Treasury—required administrative resources: including time and personnel to process these checks. Burns' illegal use of AID's system of paying its vendors, then, can be readily distinguished from those crimes involving basic theft of government property, such as stealing government supplies. The trial judge's conclusion that Burns' entanglement of two federal departments in his plan constituted disruption of a government function cannot be deemed unreasonable.

4. Reasonableness of Departure

[5] Burns argues that the amount of departure—23 months, or 62 percent above the maximum sentence under the Guidelines—was unreasonable in light of the trial court's reasons for departure and the purposes behind the punishment. Burns contends that the 60-month sentence is greater than necessary to serve the purposes of retribution, deterrence, incapacitation, and rehabilitation that were contemplated by the Sentencing Reform Act of 1984. 18 U.S.C. § 3553(a). He notes that he has already lost all of his assets and that he must surrender a portion of all future earnings. Moreover, as he will never work for the government again, he asserts that excessive punishment is unnecessary to protect the public from his crimes. Finally, he argues that his financial skills will go to waste in prison and could better benefit society if he were released sooner.

The trial court is best situated to decide the length of the sentence and its finding should not be reversed unless it is arbitrary or capricious. *United States v. Juarez-Ortega*, 866 F.2d 747, 748 (5th Cir.1989). We cannot conclude that the sentence of 60 months is unreasonable. The trial judge offered three specific and legitimate grounds for departure, and it is not the place of this court to second-guess her sentencing decision. *See United States v. Peterson*, 872 F.2d 597, 606-607 (5th Cir. 1989), *cert. denied*, — U.S. —, 110 S.Ct. 175, 107 L.Ed.2d 131 (1989).

C. *Notice of Intention to Depart*

[6] Burns maintains that the trial court erred by failing to give him an opportunity to comment on its intention to depart from the Guidelines. He notes that Federal Rule of Criminal Procedure 32(a)(1) requires the court to give both sides notice of the probation officer's presentence report, including any factors indicating that departure from the Guidelines would be appropriate. Furthermore, at the sentencing hearing, counsel must be given an opportunity "to comment upon the probation officer's determination and on other matters relating to the appropriate sentence." Burns maintains that Rule 32(a)(1), when read in conjunction with Guidelines § 6A1.3, requiring that the trial court fairly resolve any disputed factor important to sentencing, requires the sentencing judge to notify the parties of her intention to depart and provide them with an opportunity to comment.

Burns' notice argument lacks merit because a requirement that the court inform the parties of its intention to depart is not contemplated by Rule 32. Such a requirement would constitute a radical deviation from past practice and would impose a cumbersome burden on trial judges. Since the defendant had an opportunity to address the court before sentencing during his allocution and has a right to appeal his sentence, he has not been harmed by the trial court's lack of notice.

Despite the contrary conclusions of certain circuits, *see, e.g., United States v. Nuno-Para*, 877 F.2d 1409, 1415 (9th Cir. 1989); *United States v. Cervantes*, 878 F.2d 50, 55 (2d Cir.1989); *United States v. Otero*, 868 F.2d 1412, 1415 (5th Cir.1989), we do not see any language in Rule 32 or the commentary requiring the sentencing court to provide the parties with advance notice of its intention to depart from the Guidelines. Pre-Guidelines sentencing procedures never called for such notice of the judge's intention to deviate from a plea bargain or a probation officer's recommendation. This is not a case in which the court is going beyond the facts in the presentencing report in deciding to depart from the Guidelines. All of the facts formed the basis of Judge Johnson's sion were contained in the presente report, and Burns could have chall the factual findings if he had believed they were erroneous. Concededly, a d dant will have less incentive to chall these facts if he expects a sentence w the Guideline range. Burns is not c lenging the facts—his 53 separate inst es of theft over a six-year period and tax evasion—which formed the basis the trial judge's departure decision. right to appeal preserves his ability to c lenge the *legal* ground on which the dep ture decision rests.

Finally, because defense counsel and th defendant are allowed to address the cou prior to sentencing, the defendant has bee given an opportunity to persuade the tri judge why sentencing within the Guidelin is warranted. Although the defendan might have made a stronger argument for himself if he had known that the judge was intending to depart from the Guidelines and the reasons for such a departure, we do not see any language in Rule 32 or the Guidelines requiring the judge to tell the defendant he should make his best case.

The Guidelines are relatively new and are only beginning to be tested. It is true, as Burns points out, that the Guidelines envision a more formalized sentencing process. Guidelines § 6A1.3, Commentary ¶ 1. However, without a more specific command from Congress or the Commission, we do not conclude that the process must include advance notice of the trial judge's decision to depart from the Guidelines.

D. *The Plea Bargaining Procedure*

[7] Although we do not find merit in Burns' notice argument, we are troubled by the plea bargaining procedure used in this case. The plea agreement reached between Burns and the government specifically provided that if either the probation office or the trial court reached a calculation different from the 30 to 37 months that the parties had agreed on, the plea bargain would be null and void. However, the agreement did not mention what the consequences were to be if the judge decided to depart from the suggested sentencing range.

We note that the defendant has waived his right to withdraw his guilty plea and face a trial. Therefore, the question as to whether he should be able to withdraw his guilty plea in light of the trial judge's decision to enhance his sentence is not at issue. Nonetheless, we are disturbed by the ambiguity in the language of the plea agreement regarding what should happen if the trial judge decided to depart from the suggested range. We realize that the Sentencing Guidelines are new to both prosecutors and defense attorneys and that such unforeseen situations may arise from time to time. We think it would be appropriate for prosecutors to modify the plea bargain agreement language to make clear that the bargain either contemplates the trial judge exercising her enhancement powers, or allows the defendant to withdraw his plea if the trial judge contemplates enhancement. If the language is left in its present vague form, a serious question could arise as to whether a defendant has reserved the power to withdraw a plea if the trial judge decides to depart from the sentencing range that the parties agreed upon.

III. Conclusion

Because the trial judge articulated three legitimate reasons why departure from the Guidelines was appropriate, her decision to impose a sentence in excess of the 30 to 37 month recommended range should not be disturbed. As the defendant has not been harmed by the trial court's failure to give him notice of its intention to depart from the Guidelines, and since such a notice requirement does not appear on the face of Rule 32 or within the Guidelines, we af-

COALITION FOR THE PRESERVATION OF HISPANIC BROADCASTING, et al, Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, Respondent,

Univision Holdings, Inc., et al., Intervenors.

Nos. 87-1285, 87-1287, 87-1299, 88-1564, 88-1588 and 88-1596.

United States Court of Appeals, District of Columbia Circuit.

Argued Sept. 11, 1989.

Decided Jan. 12, 1990.

Challenge was brought to orders of the Federal Communications Commission (FCC) which approved settlement agreement providing for grant of license renewal of applications for licensee subject to prompt transfer of licenses to holding company, denied petitions for acceptance of competing applications, and granted applications to transfer control of licenses to holding company. The Court of Appeals, Mikva, Circuit Judge, held that: (1) three companies which made unsuccessful attempts to become licensee for the stations at issue had standing as prospective competitors to challenge the FCC's approval of the settlement agreements; (2) FCC properly refused to accept competing applications; and (3) FCC violated its *Jefferson Radio* policy.

Remanded.

Stephen F. Williams, Circuit Judge, issued an opinion dissenting in part and concurring in part.

1. Telecommunications ⇐421

Companies which made unsuccessful attempts to become licensee for Hispanic radio stations had standing to challenge settlement agreement approved by Federal Communications Commission which approved transfer of licenses to holding company; companies were prospective competi-

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA :

vs. : Criminal No. 88-0302

WILLIAM J. BURNS :

FILED

OCT 14 1988

JAMES F. DAVEY, Clerk

MEMORANDUM ORDER

Defendant William J. Burns entered a plea of guilty to the following offenses: theft of government property, in violation of Title 18, U.S. Code, section 641 (1982); false claims against the government in violation of Title 18, U.S.C. Code, section 287 (1982); and tax evasion in violation of Title 26, U.S. Code, section 7201 (1982).

The Sentencing Guidelines are applicable to this defendant. Pursuant to the Guidelines, defendant may be sentenced to a prison term of 30 to 37 months. Under the appropriate circumstances, however, the Court may depart from the sentence imposed by the Guidelines. Title 18, U.S.Code, section 3553(b) (1982), authorizes a departure from the Sentencing Guidelines when the Court finds that "there exists an aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines ...." In its policy statement, the U.S. Sentencing

Commission states that the presence of factors not adequately considered in the Guidelines may, in the discretion of the sentencing judge, warrant departure from the Guidelines. Moreover, the Court may depart from the Guidelines even though the reason for departure is listed elsewhere in the Guidelines if the Court determines that in light of unusual circumstances, the Guideline level attached to that factor is inadequate. Further, the Commission stated that the "controlling decision as to whether and to what extent departure is warranted can only be made by the court at the time of sentencing." United States Sentencing Commission, Sentencing Guidelines, § 5K2.0. Thus, the Guidelines expressly authorize the sentencing judge to consider circumstances at sentencing that may justify departure form the established Guidelines.

The Court finds at least three factors involved in the defendant's offenses which the Guidelines either fail to address or to consider adequately. First, the Court finds that the Guidelines, in considering the severity of the offenses, do not sufficiently weigh the duration of defendant's criminal activity. The Court recognizes that the statute of limitations on the crimes committed by defendant is only five years, but defendant has confessed to theft from the United States Government for over six years, from February 25, 1982, to May 26, 1988. Throughout the course of these six years, defendant caused fifty-three

different fraudulent checks to be issued by the United States Government. While the Guidelines permit the Court to consider the level of planning involved in the offense, and the amount of money stolen, the number of years and the amount of fraudulent transactions planned, schemed, and executed were not considered pursuant to the Guidelines. The Court finds it significant that the defendant persisted for over five years in perpetrating this criminal activity against the taxpayers of the United States Government. The failure of the Sentencing Guidelines to account for this is a ground for departure.

Moreover, while the Guidelines do take into consideration the fact that defendant violated the public trust in committing these crimes, the Court finds that there was more involved in defendant's acts of theft and false claims than a mere violation of public duties. Defendant abused a process relied upon by the government to pay those who perform important and legitimate services for the United States. In taking fraudulent advantage of this vital system of remuneration over such a lengthy period of time, plaintiff has disrupted the functions of the government in addition to violating the public trust.

In addition to violating the public trust, defendant totally violated his oath of employment by engaging in this protracted, devious conduct. A million, three hundred thousand dollars, if stolen at one time, would have been much easier to detect than the same amount of money stolen

over a lengthy period of time. In his particularly devious manner, defendant stole at a rate and in a manner which made detection very difficult.

The Sentencing Guidelines permit departure when the "defendant's conduct resulted in a significant disruption of a governmental function, [and] the court may increase the sentence above the authorized guideline range". Id. at § 5K2.7. The Court finds that defendant caused significant governmental disruption by stealing government funds in excess of one million dollars, over a six year period, and by way of fifty-three separate fraudulent instruments.

Finally, the Guidelines permit the Court to depart from the prescribed sentence if "the defendant committed the offense in order to facilitate or conceal the commission of another offense ..." Id. at § 5K2.9. In this case, as stated in Count III, the defendant failed to report the stolen income for calendar years 1982-1987, resulting in a tax obligation of almost half a million dollars. By continually evading the payment of his tax liability, the defendant concealed the crimes of theft and false claims. Certainly, if this concealment had not taken place, defendant's crimes would have been discovered much earlier.

For these reasons, the Court finds that several important elements of the crimes committed by defendant are not considered fully by the Sentencing Guidelines, thus warranting departure from its prescription. This being the

case, the Court relies upon its own judgment and experience and finds that the range of thirty to thirty-seven months for the offenses committed by defendant is insufficient and does not reflect the magnitude of defendant's criminal conduct. The Court, therefore, increases the offense level from nineteen to twenty four which provides a sentencing range of fifty-one to sixty-three months. Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that defendant be committed to the custody of the Bureau of Prisons for a term of sixty months.

NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

DATED: October 14, 1988

5

United States District Court

District of COLUMBIA

UNITED STATES OF AMERICA
V.

William J. Burns

(Name of Defendant)

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

Case Number 88-302

FILED
OCT 14 1988
JAMES F. DAVEY, Clerk

David Addis, Esq.
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1-3
☐ was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
18 U.S.C. 641	Theft of Government Funds	1
18 U.S.C. 287	False Claims	2
26 U.S.C. 7201	Attempt to Evade Income Tax	3

(Offenses committed 2/25/82 to 5/26/88, 6/29/88, and 2/25/82 to 5/26/88, respectively)

The defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).
☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.
☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
☒ It is ordered that the defendant shall pay to the United States a special assessment of $ 150.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
578-54-8762

Defendant's mailing address:
(incarcerated)

Defendant's residence address:
(incarcerated)

10/14/88
Date of Imposition of Sentence

Signature of Judicial Officer
NORMA HOLLOWAY JOHNSON
U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

10/14/88
Date

COURTMAN

Defendant: William J. Burns
Case Number: 88-302

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of sixty (60) months.

☒ The Court makes the following recommendations to the Bureau of Prisons:

that the defendant be incarcerated at the federal institution at Allenwood, Pennsylvania.

☒ The defendant is remanded to the custody of the United States Marshal.
☐ The defendant shall surrender to the United States Marshal for this district,

☐ at _____ a.m. / p.m. on _____.

☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

☐ before 2 p.m. on _____.
☐ as notified by the United States Marshal.
☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: William J. Burns
Case Number: 88-302

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of _____

three (3) years

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

The defendant shall provide the U.S. Probation Office with financial information.

The defendant shall complete one hundred (100) hours of community service per year during supervised release.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-3161 September Term, 19 89

CA 88-0302-01

United States of America

v.

William J. Burns,

Appellant

BEFORE: Mikva, Silberman and D. H. Ginsburg, Circuit Judges

O R D E R

Upon consideration of Appellant's Petition for Rehearing, filed February 23, 1990, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPR , CLERK

BY: Robert A. Bonner

Robert A. Bonner
Deputy Clerk

RECEIVED
MAR 16 1990

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-3161 September Term, 19 89

CA 88-0302-01

United States Court of Appeals
For the District of Columbia Circuit
FILED MAR 15 1990
CONSTANCE L. DUPRÉ
CLERK

United States of America

v.

William J. Burns,

Appellant

BEFORE: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, and Thomas, Circuit Judges

O R D E R

Appellant's Suggestion For Rehearing En Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: Robert A. Bonner

Robert A. Bonner
Deputy Clerk

Circuit Judge Thomas did not participate in this matter.

APPENDIX B

1972 AMENDMENT

Subdivision (e) is new. It is intended to provide procedural implementation of the recently enacted criminal forfeiture provision of the Organized Crime Control Act of 1970, Title IX, § 1963, and the Comprehensive Drug Abuse Prevention and Control Act of 1970, Title II, § 408(a)(2).

The assumption of the draft is that the amount of the interest or property subject to criminal forfeiture is an element of the offense to be alleged and proved. See Advisory Committee Note to rule 7(c)(2).

Although special verdict provisions are rare in criminal cases, they are not unknown. See *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969), especially footnote 41 where authorities are listed.

VII. JUDGMENT

Rule 32. Sentence and Judgment

(a) Sentence.

(1) Imposition of Sentence. Sentence shall be imposed without unnecessary delay, but the court may, upon a motion that is jointly filed by the defendant and by the attorney for the Government and that asserts a factor important to the sentencing determination is not capable of being resolved at that time, postpone the imposition of sentence for a reasonable time until the factor is capable of being resolved. Prior to the sentencing hearing, the court shall provide the counsel for the defendant and the attorney for the Government with notice of the probation officer's determination, pursuant to the provisions of subdivision (c)(2)(B), of the sentencing classifications and sentencing guideline range believed to be applicable to the case. At the sentencing hearing, the court shall afford the counsel for the defendant and the attorney for the Government an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence. Before imposing sentence, the court shall also—

(A) determine that the defendant and his counsel have had the opportunity to read and discuss the presentence investigation report made available pursuant to subdivision (c)(3)(A) or summary thereof made available pursuant to subdivision (c)(3)(B);

(B) afford counsel for the defendant an opportunity to speak on behalf of the defendant; and

(C) address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of the sentence.

The attorney for the Government shall have an equivalent opportunity to speak to the court. Upon a motion that is jointly filed by the defendant and by the attorney for the Government, the court may hear in camera such a statement by the defendant, counsel for the defendant, or the attorney for the Government.

(2) Notification of Right to Appeal. After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal, including any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere, except that the court shall advise the defendant of any right to appeal his sentence. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

(b) Judgment.

(1) In General. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(2) Criminal Forfeiture. When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper.

(c) Presentence Investigation.

(1) When Made. A probation officer shall make a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. 3553, and the court explains this finding on the record.

The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere

or has been found guilty, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time.

(2) **Report.** The report of the presentence investigation shall contain—

(A) information about the history and characteristics of the defendant, including his prior criminal record, if any, his financial condition, and any circumstances affecting his behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant;

(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission pursuant to section 994(a) of title 28, that the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1); and an explanation by the probation officer of any factors that may indicate that a sentence of a different kind or of a different length from one within the applicable guideline would be more appropriate under all the circumstances;

(C) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2);

(D) verified information stated in a nonargumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed;

(E) unless the court orders otherwise, information concerning the nature and extent of nonprison programs and resources available for the defendant; and

(F) such other information as may be required by the court.

(3) **Disclosure.**

(A) At a reasonable time before imposing sentence the court shall permit the defendant and the defendant's counsel to read the report of the presentence investigation, including the information required by subdivision (c)(2) but not including any final recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinions which, if disclosed, might seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. The court shall afford the defendant and the defendant's counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it.

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant and the defendant's counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

(C) Any material which may be disclosed to the defendant and the defendant's counsel shall be disclosed to the attorney for the government.

(D) If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons.

(E) Any copies of the presentence investigation report made available to the defendant and the defendant's counsel and the attorney for the government shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation, unless the court, in its discretion otherwise directs.

(F) The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3552(b) shall be considered a presentence investigation within the meaning of subdivision (c)(3) of this rule.

(d) Plea Withdrawal. If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

(e) Probation. After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation if permitted by law.

(f) [Revocation of Probation.] (Abrogated Apr. 30, 1979, eff. Dec. 1, 1980)

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 22, 1974, eff. Dec. 1, 1975, as amended Pub.L. 93-361, July 30, 1974, 88 Stat. 397 and Pub.L. 94-64, § 2, July 31, 1975, 89 Stat. 370; July 31, 1975, Pub.L. 94-64, § 3(31)-(34), 89 Stat. 376; Apr. 30, 1979, eff. Aug. 1, 1979, Dec. 1, 1980; Pub.L. 97-291, § 3, Oct. 12, 1982, 96 Stat. 1249; Apr. 28, 1983, eff. Aug. 1, 1983; Oct. 12, 1984, Pub.L. 98-473, Title II, § 215(a), 98 Stat. 2014; Nov. 10, 1986, Pub.L. 99-646, § 25, 100 Stat. 3597; Mar. 9, 1987, eff. Aug. 1, 1987.)

Rule Applicable to Offenses Committed Prior to Nov. 1, 1987

This rule as in effect prior to amendment by Pub.L. 98-473 read as follows:

Rule 32. Sentence and Judgment

(a) Sentence.

(1) Imposition of Sentence. Sentence shall be imposed without unreasonable delay. Before imposing sentence the court shall

(A) determine that the defendant and the defendant's counsel have had the opportunity to read and discuss the presentence investigation report made available pursuant to subdivision (c)(3)(A) or summary thereof made available pursuant to subdivision (c)(3)(B);

(B) afford counsel an opportunity to speak on behalf of the defendant; and

(C) address the defendant personally and ask the defendant if the defendant wishes to make a statement in the defendant's own behalf and to present any information in mitigation of punishment.

The attorney for the government shall have an equivalent opportunity to speak to the court.

(2) Notification of Right to Appeal. After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

(b) Judgment.

(1) In General. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(2) Criminal Forfeiture. When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper.

(c) Presentence Investigation.

(1) When Made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record.

The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time.

(2) Report. The presentence report shall contain—

(A) any prior criminal record of the defendant;

(B) a statement of the circumstances of the commission of the offense and circumstances affecting the defendant's behavior;

(C) information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense; and

(D) any other information that may aid the court in sentencing, including the restitution needs of any victim of the offense.

(3) Disclosure.

(A) At a reasonable time before imposing sentence the court shall permit the defendant and the defendant's counsel to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinions which, if disclosed, might seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. The court shall afford the defendant and the defendant's counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it.

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence and shall give the defendant and the defendant's counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

(C) Any material which may be disclosed to the defendant and the defendant's counsel shall be disclosed to the attorney for the government.

under guidelines, district courts are encouraged to consider the approach that is most appropriate under local conditions. The Commission intends to reexamine this issue in light of experience under the guidelines.

§6A1.3. Resolution of Disputed Factors

(a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

(b) The court shall resolve disputed sentencing factors in accordance with Rule 32(a)(1), Fed. R. Crim. P. (effective Nov. 1, 1987), notify the parties of its tentative findings and provide a reasonable opportunity for the submission of oral or written objections before imposition of sentence.

Commentary

In current practice, factors relevant to sentencing are often determined in an informal fashion. The informality is to some extent explained by the fact that particular offense and offender characteristics rarely have a highly specific or required sentencing consequence. This situation will no longer exist under sentencing guidelines. The court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair. Although lengthy sentencing hearings should seldom be necessary, disputes about sentencing factors must be resolved with care. When a reasonable dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. See United States v. Fatico, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979). The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.

In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. 18 U.S.C. § 3661. Any information may be considered, so long as it has "sufficient indicia of reliability to support its probable accuracy." United States v. Marshall, 519 F.Supp. 751 (D.C. Wis. 1981), aff'd, 719 F.2d 887 (7th Cir. 1983); United States v. Fatico, 579 F.2d 707 (2d Cir. 1978). Reliable hearsay evidence may be considered. Out-of-court declarations by an unidentified informant may be considered "where there is good cause for the nondisclosure of his identity and there is sufficient corroboration by other means." United States v. Fatico, 579 F.2d at 713. Unreliable allegations shall not be considered. United States v. Weston, 448 F.2d 626 (9th Cir. 1971).

If sentencing factors are the subject of reasonable dispute, the court should, where appropriate, notify the parties of its tentative findings and afford an opportunity for correction of oversight or error before sentence is imposed.

CHAPTER SIX - SENTENCING PROCEDURES AND PLEA AGREEMENTS

PART A - SENTENCING PROCEDURES

Introductory Commentary

This Part addresses sentencing procedures that are applicable in all cases, including those in which guilty or nolo contendere pleas are entered with or without a plea agreement between the parties, and convictions based upon judicial findings or verdicts. It sets forth the procedures for establishing the facts upon which the sentence will be based. Reliable fact-finding is essential to procedural due process and to the accuracy and uniformity of sentencing.

§6A1.1. Presentence Report

A probation officer shall conduct a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is information in the record sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. § 3553, and the court explains this finding on the record. Rule 32(c)(1), Fed. R. Crim. P. The defendant may not waive preparation of the presentence report.

Commentary

A thorough presentence investigation is essential in determining the facts relevant to sentencing. In order to ensure that the sentencing judge will have information sufficient to determine the appropriate sentence, Congress deleted provisions of Rule 32(c), Fed. R. Crim. P., which previously permitted the defendant to waive the presentence report. Rule 32(c)(1) permits the judge to dispense with a presentence report, but only after explaining, on the record, why sufficient information is already available.

§6A1.2. Disclosure of Presentence Report; Issues in Dispute (Policy Statement)

Courts should adopt procedures to provide for the timely disclosure of the presentence report; the narrowing and resolution, where feasible, of issues in dispute in advance of the sentencing hearing; and the identification for the court of issues remaining in dispute. See Model Local Rule for Guideline Sentencing prepared by the Probation Committee of the Judicial Conference (August 1987).

Commentary

In order to focus the issues prior to sentencing, the parties are required to respond to the presentence report and to identify any issues in dispute. The potential complexity of factors important to the sentencing determination normally requires that the position of the parties be presented in writing. However, because courts differ greatly with respect to their reliance on written plea agreements and with respect to the feasibility of written statements

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EFFECTIVE DATE OF 1986 AMENDMENT

Section 7(b) of Pub. L. 99-646 provided that: "The amendments made by this section [amending this section] shall take effect on the date of the taking effect of section 3552 of title 18, United States Code [Nov. 1, 1987]."

EFFECTIVE DATE

Section effective Nov. 1, 1987, and applicable only to offenses committed after the taking effect of this section, see section 235(a)(1) of Pub. L. 98-473, set out as a note under section 3551 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 3672, 4106A of this title.

§ 3553. Imposition of a sentence

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE.—The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(c) STATEMENT OF REASONS FOR IMPOSING A SENTENCE.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) PRESENTENCE PROCEDURE FOR AN ORDER OF NOTICE.—Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) LIMITED AUTHORITY TO IMPOSE A SENTENCE BELOW A STATUTORY MINIMUM.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another

person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(Added Pub. L. 98-473, title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1989, and amended Pub. L. 99-570, title I, § 1007(a), Oct. 27, 1986, 100 Stat. 3207-7; Pub. L. 99-646, §§ 8(a), 9(a), 80(a), 81(a), Nov. 10, 1986, 100 Stat. 3593, 3619; Pub. L. 100-182, §§ 3, 16(a), 17, Dec. 7, 1987, 101 Stat. 1266, 1269, 1270; Pub. L. 100-690, title VII, § 7102, Nov. 18, 1988, 102 Stat. 4416.)

AMENDMENTS

1988—Subsec. (c). Pub. L. 100-690 inserted "or other appropriate public record" after "transcription" in second sentence and struck out "clerk of the" before "court" in last sentence.

1987—Subsec. (b). Pub. L. 100-182, § 3(1), (2), substituted "court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result" for "court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result".

Pub. L. 100-182, § 3(3), inserted after first sentence "In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission."

Pub. L. 100-182, § 16(a), substituted "In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission." for "In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, the applicable policy statements of the Sentencing Commission, and the purposes of sentencing set forth in subsection (a)(2)."

Subsec. (c)(1). Pub. L. 100-182, § 17, inserted "and that range exceeds 24 months,".

1986—Subsec. (a)(7). Pub. L. 99-646, § 81(a), added par. (7).

Subsec. (b). Pub. L. 99-646, § 9(a), inserted provision relating to sentencing in the absence of applicable guidelines.

Subsec. (c). Pub. L. 99-646, § 8(a), substituted "If the court does not order restitution, or orders only partial restitution" for "If the sentence does not include an order of restitution".

Subsec. (d). Pub. L. 99-646, § 80(a), struck out "or restitution" after "notice" in heading, and struck out "or an order of restitution pursuant to section 3556," after "section 3555," in introductory text.

Subsec. (e). Pub. L. 99-570 added subsec. (e).

EFFECTIVE DATE OF 1987 AMENDMENT

Amendment by Pub. L. 100-182 applicable with respect to offenses committed after Dec. 7, 1987, see section 26 of Pub. L. 100-182, set out as a note under section 3006A of this title.

EFFECTIVE DATE OF 1986 AMENDMENTS

Section 8(c) of Pub. L. 99-646 provided that: "The amendments made by this section [amending sections 3553 and 3663 of this title] shall take effect on the date of the taking effect of section 3583 of title 18, United States Code [Nov. 1, 1987]."

Section 9(b) of Pub. L. 99-646 provided that: "The amendments made by this section [amending this section] shall take effect on the date of the taking effect of section 3553 of title 18, United States Code [Nov. 1, 1987]."

Section 80(b) of Pub. L. 99-646 provided that: "The amendments made by this section [amending this section] shall take effect on the date of the taking effect of section 212(a)(2) of the Sentencing Reform Act of 1984 [section 212(a)(2) of Pub. L. 98-473, effective Nov. 1, 1987]."

Section 81(b) of Pub. L. 99-646 provided that: "The amendments made by this section [amending this section] shall take effect on the date of the taking effect of section 212(a)(2) of the Sentencing Reform Act of 1984 [section 212(a)(2) of Pub. L. 98-473, effective Nov. 1, 1987]."

Section 1007(b) of Pub. L. 99-570 provided that: "The amendment made by this section [amending this section] shall take effect on the date of the taking effect of section 3553 of title 18, United States Code [Nov. 1, 1987]."

EFFECTIVE DATE

Section effective Nov. 1, 1987, and applicable only to offenses committed after the taking effect of this section, see section 235(a)(1) of Pub. L. 98-473, set out as a note under section 3551 of this title.

AUTHORITY TO LOWER A SENTENCE BELOW STATUTORY MINIMUM FOR OLD OFFENSES

Section 24 of Pub. L. 100-182 provided that: "Notwithstanding section 235 of the Comprehensive Crime Control Act of 1984 [section 235 of Pub. L. 98-473, set out as a note under section 3551 of this title]—

"(1) section 3553(e) of title 18, United States Code;

"(2) rule 35(b) of the Federal Rules of Criminal Procedure as amended by section 215(b) of such Act [set out in the Appendix to this title]; and

"(3) rule 35(b) as in effect before the taking effect of the initial set of guidelines promulgated by the United States Sentencing Commission pursuant to chapter 58 of title 28, United States Code,

shall apply in the case of an offense committed before the taking effect of such guidelines."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1031, 3551, 3552, 3555, 3562, 3563, 3564, 3565, 3572, 3582, 3583, 3584, 3742 of this title; title 28 sections 991, 994, 995.

§ 3554. Order of criminal forfeiture

The court, in imposing a sentence on a defendant who has been found guilty of an offense described in section 1962 of this title or in title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 shall order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant forfeit property to the United States in accordance with the provisions of section 1963 of this title or section 413 of the Comprehensive Drug Abuse and Control Act of 1970.

(Added Pub. L. 98-473, title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1990.)

REFERENCES IN TEXT

The Comprehensive Drug Abuse Prevention and Control Act of 1970, referred to in text, is Pub. L. 91-513, Oct. 27, 1970, 84 Stat. 1236, as amended. Title II of this Act, known as the Controlled Substances Act, is classified principally to subchapter I (§ 801 et

APPENDIX C

AO 442 (Rev. 12/85) Warrant for Arrest

United States District Court

88-0302

DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA
V.
WILLIAM J. BURNS

WARRANT FOR ARREST

CASE NUMBER: 88-0520M-01

To: The United States Marshal
and any Authorized United States Officer

YOU ARE HEREBY COMMANDED to arrest WILLIAM J. BURNS
Name

and bring him or her forthwith to the nearest magistrate to answer a(n)

☐ Indictment ☐ Information ☒ Complaint ☐ Order of court ☐ Violation Notice ☐ Probation Violation Petition

charging him or her with (brief description of offense)

Theft of Government Funds in Excess of $100.00 and Racketeering

In violation of Title 18 United States Code, Section(s) 641 and 1962(c)

LOUIS F OBERDORFER — Name of Issuing Officer
USDJ — Title of Issuing Officer
Louis F. Oberdorfer — Signature of Issuing Officer
JUL 12 1988
D.C. — Date and Location

Bail fixed at $ _____ by _____
Name of Judicial Officer

RETURN

This warrant was received and executed with the arrest of the above-named defendant at 515 22nd St NW 8th Fl Washington DC

DATE RECEIVED	NAME AND TITLE OF ARRESTING OFFICER	SIGNATURE OF ARRESTING OFFICER
7/12/88	S.C. GRIGGS POSTAL INSPECTOR	SC Griggs
DATE OF ARREST 7/12/88		

OF THE GOVERNMENT AGENCY.

UNDER THE INFORMATION, YOUR HONOR, FROM FEBRUARY 25TH OF 1982, AND THROUGH MAY 26TH OF 1988, MR. BURNS PREPARED FALSE AND FRAUDULENT 1166'S IN THE NAME OF VINCENT KAUFFMAN. THESE WERE SIGNED BY MR. BURNS AS CERTIFYING OFFICER AND ONLY HIS SIGNATURE WAS REQUIRED TO MAKE IT A VALID DOCUMENT.

MR. BURNS THEN CAUSED THESE TO BE SUBMITTED TO THE UNITED STATES TREASURY, WHICH IS ALSO LOCATED IN THE DISTRICT OF COLUMBIA, AND THESE FORMS HAD INSTRUCTIONS ON THEM TO PREPARE A GOVERNMENT CHECK AGAINST THE A.I.D. FUNDS, SEND THAT CHECK TO SIGNET BANK IN WASHINGTON, D.C. SO THEY COULD BE DEPOSITED IN AN ACCOUNT IN THE NAME OF VINCENT KAUFFMAN.

IN REALITY, THE VINCENT KAUFFMAN ACCOUNT HAD BEEN OPENED BY MR. BURNS, MAINTAINED BY MR. BURNS, ALL DEPOSITS WERE TREASURY CHECKS AND ONLY TREASURY CHECKS DONE IN THE MANNER I'VE JUST DESCRIBED AND ALL WITHDRAWALS WERE DONE BY MR. BURNS FROM THAT ACCOUNT EITHER THROUGH THE MONEY MACHINE OR THROUGH CHECKS WHICH MR. BURNS WROTE, SIGNED THE NAME VINCENT KAUFFMAN AND MADE OUT TO HIMSELF.

THOSE FUNDS WERE THEN TRANSFERRED IN LARGE PART INTO MR. BURNS' OWN ACCOUNTS IN HIS OWN NAME IN MARYLAND. THE MONEY WAS SPENT FOR HIS HOUSE, CARS, FURNITURE, TRIPS, JEWELRY AND OTHER PERSONAL AND LUXURY ITEMS FOR MR. BURNS AND HIS FAMILY.

AS TO THE 287 COUNT, THE FALSE CLAIMS ACCOUNT, AFTER THE INVESTIGATION UNCOVERED WHAT MR. BURNS HAD BEEN DOING WITH

THE 1166'S, TWO MORE WERE SUBMITTED IN JUNE, JUNE 29TH OF 1988. THEY WERE AGAIN SUBMITTED TO THE UNITED STATES TREASURY IN THE DISTRICT OF COLUMBIA, FILLED OUT AND SIGNED BY MR. BURNS. ONE WAS FOR $23,804.21. THE OTHER WAS FOR $22,270.46. PAYMENT WAS NOT MADE ON THOSE, BUT THEY WERE FALSE CLAIMS, IN THAT NO ONE NAMED VINCENT KAUFFMAN EXISTED, AS MR. BURNS KNEW, AND NO PAYMENT WAS DUE MR. KAUFFMAN FROM A.I.D.

AS TO THE ATTEMPTED EVASION OF TAXES OR TAX EVASION COUNT, YOUR HONOR, WE WOULD REFERENCE AGAIN WHAT WE HAVE PREVIOUSLY SAID ABOUT MR. BURNS' SCHEME TO EMBEZZLE AND STEAL MONEY FROM A.I.D. AND FROM THE TREASURY.

MR. BURNS' TAX RETURN FORMS FOR THE YEARS 1982 THROUGH 1987 DIDN'T REFLECT ANY OF THIS MONEY THAT HE HAD MADE THROUGH VINCENT KAUFFMAN, AND SPECIFIC IN 1982 THERE WAS $93,289 IN TAXABLE INCOME WHICH WAS NOT RECORDED, WHICH RESULTED IN A TAX DUE WHICH WAS NOT PAID OF $40,375. IN 1983 THERE WAS $61,270 OF UNREPORTED INCOME, RESULTING IN A TAX DUE AND OWING WHICH WAS NOT PAID OF $26,750. IN 1984, $190,610 OF UNREPORTED TAXABLE INCOME, RESULTING IN A TAX DUE AND OWING WHICH WAS NOT PAID OF $91,157. IN 1985 THERE WAS $409,064 OF TAXABLE INCOME WHICH WAS NOT REPORTED AND THERE WAS A TAX DUE AND OWING WHICH WAS NOT PAID OF $192,697. IN 1986 THERE WAS $181,806 OF TAXABLE INCOME WHICH WAS NOT REPORTED AND A TAX DUE AND OWING WHICH WAS NOT PAID OF $76,326. AND IN 1987 THERE WAS $142,790 OF TAXABLE INCOME WHICH WAS NOT REPORTED AND A TAX DUE AND OWING OF

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States of America	)	
	)	
vs.	)	Docket No. 88-0302-01
	)	
BURNS, William J.	)	

PRESENTENCE REPORT

Prepared for:	The Honorable Norma H. Johnson United States District Judge
Prepared by:	Ralph Ardito, Jr. United States Probation Officer Telephone: 535-3181
Sentencing date:	October 11, 1988 at 9:45 a.m.
Offense:	Count 1: 18 U.S.C. 641, Theft of Government Funds, a class C felony Count 2: 18 U.S.C. 287, False Claims Against the Government, a class D felony Count 3: 26 U.S.C. 7201, Tax Evasion, a class D felony
Release status:	Arrested on July 12, 1988; released on July 18, 1988, on a $500,000 property bond and has remained in the community since that time.

Identifying Data

Date of Birth:	February 19, 1940
Social Security Number:	578-54-8762
Address:	3048 Brownstone Court Burtonsville, Maryland 20866
Detainers:	None
Codefendants:	None

10/14/88: 60 months confinement, 3yrs Supervised release
100 hrs Community Service per year in Lieu
of fine.

Court recommends FCI. Allenwood.

Assistant U.S. Attorney	Defense Counsel
James Cole	David Addis (Retained)
Public Integrity Section	c/o Dickstein, Shapiro & Morin
Department of Justice	2101 L Street, N.W.
1400 New York Avenue, N.W.	Washington, D.C. 20037
Washington, D.C. 20005	Telephone: 785-9700
Telephone: 786-5056	
Date Report Prepared:	September 20, 1988
Date Revised:	

PART A. THE OFFENSE

Charge(s) and Conviction(s)

1. On August 10, 1988, William J. Burns was named in a three count Information charging him with Theft of Government Property, in violation of Title 18, U.S. Code, Section 641 (Count 1); False Claims Against the Government, in violation of Title 18, U.S. Code, Section 287 (Count 2); and Tax Evasion, in violation of Title 26, U.S. Code, Section 7201 (Count 3). On August 11, 1988, the defendant appeared before the Honorable Norma Holloway Johnson, at which time he entered a plea of guilty to the three count Information. At the time of plea, a sentencing date was scheduled for October 11, 1988, at 9:45 a.m.

2. Since the offense took place after November 1, 1987, the Sentencing Reform Act of 1984 is applicable.

Related Cases

3. None.

The Offense Conduct

4. In December of 1987, the Agency for International Development conducted a routine background check on the defendant as he maintained a security clearance with that agency. The investigation determined that the defendant was living in a Burtonsville, Maryland home valued in excess of $400,000, which raised suspicions as the defendant's income was $35,108. As a result, a credit check was done, where the agency discovered numerous bank accounts in the defendant's name. An analysis of the bank records revealed numerous checks authorized by the Agency for International Development originally payable to Vincent Kaufman, subsequently deposited into Mr. Burns' account. It was later proven by way of handwriting analysis that Vincent Kaufman was, in fact, William Burns.

5. The internal investigation determined the following scheme, which resulted in the theft of Government funds by the defendant. Mr. Burns, as supervisor of the Financial Management Section, with authority to approve travel vouchers, would issue a false claim (Form 1034) in the name of Vincent Kaufman. Vincent Kaufman allegedly was a contractor who would move furniture for the Agency for International Development. The false form was prepared by a clerk and subsequently approved by the defendant. The voucher would then be sent to the U.S. Treasury Department for payment to Vincent Kaufman. The payment checks were then sent directly to the account of Vincent Kaufman for deposit and subsequently removed by the

defendant. The Government has determined that 53 fraudulent checks were issued and the total amount of the theft was $1,261,184.92.

6. Mr. Burns fully admitted that he committed this offense, stating that he was in financial difficulty at the time it occurred. Also, he was being divorced from his first wife and at least initially, the stolen funds were used to pay his required child support payments. Subsequently, the money was used to impress his girlfriend, Kathy Martini, whom he later married. He said that not only did he deceive his wife and family, but ultimately, himself.

7. Between February 25, 1982 and May 26, 1988, the defendant embezzled from the Agency for International Development $1,261,184.92, which monies he failed to report to the Internal Revenue Service for calendar years 1982, 1983, 1984, 1985, 1986, and 1987. As a result of his failure to report this income, he has an outstanding tax obligation of $475,685.

Adjustment for Obstruction of Justice

8. The Probation Officer has no information to suggest that Mr. Burns impeded or obstructed justice in this case.

Adjustment for Acceptance of Responsibility

9. Mr. Burns has fully accepted responsibility for the theft of approximately $1.2 million. He has fully cooperated with the Government in identifying the properties and monies that were recoverable and he has agreed to transfer any and all assets to the Government.

Offense Level Computation

10. Counts 1 and 2 of the Information represent related offense conduct and each count is treated as a single group. Section 3D1.2(1).

11. Because Count 3 of the Information represents an unrelated offense, this count will be treated as a separate group. Section 3D1.3(a).

Counts 1 and 2 - Theft of Government Funds and False Claims Against the Government

12. Base Offense Level: The guideline for 18 U.S.C. 641 and 18 U.S.C. 287 is found in Section 2B1.1(b)(1) and 2F1.1 of the Guidelines. Those sections provide that Theft of Government Funds and False Claims Against the Government in the amount of $1,215,110.45 have a base offense level of 17.

13. Specific Offense Characteristics: The defendant was a public servant who violated a trust and used a special skill in a manner to significantly facilitate the commission of the offense. Based on Section 3B1.3, the offense level is increased two levels.

14. Victim Related Adjustment: None

15. Adjustment for Obstruction of Justice: None

16. Adjusted Offense Level (subtotal):

Count 3 - Tax Evasion

17. Base Offense Level: The guideline for 26 U.S.C. 7201 is found in Section 2T1.1 (a) of the Guidelnes. That section provides that Tax Evasion has a base offense level of 14.

18. Specific Offense Characteristics: As the defendant failed to report income exceeding $10,000, an increase of 2 levels is appropriate (Section 2T1.1(b)(1)(A)).

19. Adjustment for Role in the Offense: None

20. Victim Related Adjustment: None

21. Adjustment for Obstruction of Justice: None

22. Adjusted Offense Level (subtotal):

Multiple Count Adjustment (see Chapter 3, Part D).

		Units
Counts 1 and 2: Adjusted Offense Level	19	
Count 3: Adjusted Offense Level	16	
Total Units		2
Greater of the Adjusted Offense Levels	19	
Increase in Offense Level	2	
Combined Adjusted Offense Level	21	

23. Adjustment for Acceptance of Responsibility: The defendant fully accepted his responsibility in Counts 1, 2 and 3 of the Information. Based on Section 3E1.1(a), the combined adjusted offense level is reduced two levels.

24. Total Offense Level:

PART B. THE DEFENDANT'S CRIMINAL HISTORY

Juvenile Adjudications.

25. None.

Criminal Convictions.

26. None.

Other Criminal Conduct

27. None.

PART C. SENTENCING OPTIONS

Custody

28. Statutory Provisions: The maximum term of imprisonment for Count 1 is ten years.

29. Statutory Provisions: The maximum term of imprisonment for Count 2 is five years.

30. Statutory Provisions: The maximum term of imprisonment for Count 3 is five years.

31. Guideline Provisions: Based on a total offense level of 19, and a criminal history category of I, the guideline imprisonment range is 30 to 37 months.

Supervised Release

32. Statutory Provisions: A term of not more than three years may be imposed in Count 1 (18 U.S.C. 3583(b)(2)).

33. Statutory Provisions: A term of not more than three years may be imposed in Counts 2 (18 U.S.C. 3583(b)(2)).

34. Statutory Provisions: A term of not more than three years may be imposed in Count 3 (18 U.S.C. 3583(b)(2)).

35. Guideline Provisions: A term of at least two years, but not more than three years in Count 1 (Section 5D3.2(b)(2)).

36. Guideline Provisions: A term of at least two years, but not more than three years in Count 2 (Section 5D3.2(b)(2)).

37. Guideline Provisions: A term of at least two years, but not more than three years in Count 3 (Section 5D3.2(b)(2)).

Probation

38. Statutory Provisions: The defendant is not eligible for probation (18 U.S.C. 3561(a)(1)).

39. Guideline Provisions: The defendant is not eligible for probation according to Section 5C2.1(f).

PART D. OFFENDER CHARACTERISTICS

Family Ties, Family Responsibilities and Community Ties

40. The defendant was born to the legal union of Edward and Margaret (nee: Ellis) Burns in New York, New York on February 19, 1940. The defendant's father was employed as a Government worker and his mother was a housewife. He described his upbringing as normal, with no unusual problems. The defendant has three older siblings, Edward Burns who is employed as a certified public accountant; Margaret Burns Hughes who is employed as a secretary; and Nora Burns Hanrahan who works as a trainer for the C&P Telephone Company. All three siblings remain close with the defendant and reside in the metropolitan Washington, D.C. area. The defendant is the only sibling to have been involved in the criminal justice system. Mr. Burns' father died at the age of 78 and his mother died, also at the age of 78.

41. The defendant was initially married to Barbara (nee: Robeson) Burns on February 8, 1962 in Bethesda, Maryland. As a result of the marriage, three children (Susan, age 19; Deborah, age 18; and Jacqueline, age 15) were born. The couple remained together until each sought a voluntary separation based on irreconcilable differences. On November 9, 1982, a decree of divorce was granted in the Circuit Court for Montgomery County (Equity No. 76296). The settlement agreement decreed that the defendant's wife would have custody of the three daughters and Mr. Burns was obligated to pay $210 per month for each child until his daughters reached the age of 18. The defendant was granted visitation rights. Mr. Burns agreed to transfer to his first wife his interest in their residence for the sum of $15,000. The defendant explained that he continues to maintain an excellent relationship with his three children and he has met the Court-ordered child support requirements. He characterized his current relationship with his former wife as poor.

42. The defendant married his current wife, Cathy (nee: Martini) Burns, age 32, on October 26, 1985, in Lanham, Maryland. As a result of this union, twin boys (William, Jr. and Robert Edward), age 23 months, were born. Mr. and Mrs. Burns appeared to have a very caring and supportive marriage and they remain committed to each other during this difficult time. It was obvious that both individuals were under a great deal of stress, the result of Mr. Burns' pending incarceration.

Mental and Emotional Health

43. There is no indication to suggest that Mr. Burns has suffered from any psychological or psychiatric impairment. The defendant was able to articulate his motivation for his involvement in the instant offense and he had excellent recall.

Physical Condition, Including Drug Dependence and Alcohol Abuse

44. The defendant stands 5'8" tall and weighs approximately 170 pounds. He characterized his physical health as excellent.

45. The defendant explained that he has never used any narcotic or mind-altering drugs. He remarked that he drinks alcohol occasionally and on a social basis.

Education and Vocational Skills

46. Mr. Burns graduated from Coolidge High School in June of 1958, in Washington, D.C. He attended Montgomery College in Takoma Park, Maryland from 1958 to 1961, majoring in business administration.

Employment Record

47. From 1967 until July 1988, Mr. Burns was employed with the United States Agency for International Development, located at 522 22nd Street, N.W., Washington, D.C. On July 29, 1988, and as a result of his arrest, he was suspended by that agency without pay. At the time of the suspension, he was employed as a supervisor for the Financial Management Section as a GS-11/step 9, earning $35,108 per year.

48. His former supervisor, Mr. Kyle Schooler, said that in his opinion, the defendant was hard-working, reliable and trustworthy. Further, Mr. Burns' integrity was never questioned during the two year period Mr. Schooler supervised the defendant.

49. Prior to this employment, he was also employed by the United States Postal Service and the Department of Labor for approximately four years.

PART E. FINES AND RESTITUTION

Statutory Provisions

50. Count 1: The maximum fine is $250,000 (18 U.S.C. §571(b)(3)(A)).

51. Count 2: The maximum fine is $250,000 (18 U.S.C. §571(b)(3)(A)).

52. Count 3: The maximum fine is $250,000 (18 U.S.C. 3571(b)(1)(A)).

53. A special assessment of $50 on each count (total: $150) is mandatory (18 U.S.C. 3013).

54. According to the Public Integrity Section, Department of Justice, the United States Government s the victim in this case. Specifically, the defendant illegally stole $1,261,184.92. Per the plea agreement, the defendant is to transfer all monies and title to properties to the United States Government. It is estimated that the United States will receive between $600,000 and $700,000 in monies and properties when the transfer is completed. Thus, the loss to the Government is $561,184.92. In the event that there is Court-ordered restitution, it should be payable to the U.S. Treasury.

Guideline Provisions

55. The fine guideline range for this offense is from $6,000 to $250,000.

Defendant's Ability to Pay

Assets	
Cash (wife, per plea agreement)	$ 10,000
Unencumbered Assets	
Vehicle (Ford Aerostar Van (wife))	16,000
Encumbered Assets	None
TOTAL ASSETS	26,000
Liabilities	
Secured Debts	None
Unsecured Debts	
Legal Fees (defendant)	35,000
Legal Fees (wife)	15,000
Federal tax obligation (before penalties and interest)	475,685
Connecticut Avenue Caterers	1,500
Credit cards (total)	8,977
TOTAL DEBT	536,162
NET WORTH	- 510,162

Monthly Cash Flow

Income	None
Necessary Living Expenses	
Mortgage	695
Food	800
Medical expenses	130
Water	55
Gas	55
Electric	196
Telephone	40
Life Insurance (no cash value)	100
Credit cards	207
Child support payment	210
TOTAL	2,488
NET MONTHLY CASH FLOW	- 2,488

56. It appears from the defendant's financial statement that he is unable to pay a fine, the cost of incarceration or supervised release.

PART F. FACTORS THAT MAY WARRANT DEPARTURE

57. There are no factors that would warrant departure from the guideline sentence.

PART G. IMPACT OF THE PLEA AGREEMENT

58. The defendant entered pleas of guilty to all counts of the Information in which he was charged. Therefore, the plea agreement did not impact on the possible sentence that could be imposed.

Respectfully submitted,

EUGENE WESLEY, JR.
CHIEF U.S. PROBATION OFFICER

By: Ralph Ardito, Jr.
Ralph Ardito, Jr.
U.S. Probation Officer

RARDITOjr:nlc

Reviewed and Approved:

Arthur Carrington
Supervising U.S. Probation Officer

ADDENDUM TO THE PRESENTENCE REPORT

The Probation Officer certifies that the presentence report, including any revision thereof, has been disclosed to the defendant, his attorney, and counsel for the Government.

OBJECTIONS

By the Government

The Assistant U.S. Attorney has reviewed the presentence report but has filed no objections within the prescribed ten-day period.

By the Defendant

The defendant, and his counsel, have reviewed the presentence report, but have filed no objections within the prescribed ten-day, perod.

CERTIFIED BY

EUGENE WESLEY, JR.
CHIEF U.S. PROBATION OFFICER

By: Ralph Ardito Jr
Ralph Ardito, Jr.
U.S. Probation Officer

Reviewed and Approved:

Arthur Carrington
Supervising U.S. Probation Officer

Date: _____

ATTACHMENT A U.S. Department of Justice

Kuzma

CR 88-302

Washington, D.C. 20530

AUG 11 1988 FILED

JAMES F. DAVEY, Clerk

FILED

OCT 14 1988

JAMES F. DAVEY, Clerk

David R. Addis, Esq.
Dickstein, Shapiro & Morin
2101 L Street, N.W.
Washington, D.C. 20037

Albert H. Turkus, Esq.
Dow, Lohnes & Albertson
Suite 500
1255 Twenty-Third Street, N.W.
Washington, D.C. 20037

Dear Messrs. Levine and Turkus:

Re: United States v. William J. Burns
No. 88-0520M/Misc. No. 88-226/Cr. No. 88-0302

I write to set out the terms of the agreement reached between the United States of America, William J. Burns, and Kathy Burns concerning the above referenced matters. The agreement is as follows:

1. Mr. Burns agrees to waive indictment and plead guilty to one count of theft of government funds (18 U.S.C. §641), one count of false claims against the United States (18 U.S.C. §287), and one count of tax evasion (26 U.S.C. §7201) as set out in the information attached as Exhibit A to this agreement. It is understood by all parties to this agreement that this plea will be covered by the Sentencing Guidelines. Based on each party's calculations it is assumed that a sentencing range of Level 19, Criminal History Category I, will apply to this case. If calculations by the United States Probation Office or the Court produces a different sentencing range, either party may withdraw from this agreement and any property transfers done pursuant to this agreement will be null and void. No agreement exists as to what sentence Mr. Burns will receive within that sentencing range or what recommendation the United States will make at the time of sentencing. The United States will not oppose a

continuation of Mr. Burns' present bond until the time of his surrender to the penal institution designated by the Bureau of Prisons.

2. Mr. Burns agrees to submit to full debriefings, under oath, and to provide truthful statements as to any and all criminal activity in which he has been involved or has knowledge, and agrees to cooperate fully with the United States in any investigations and prosecutions which may result from these debriefings.

3. Mr. Burns and his wife, Kathy Burns, agree to submit to full debriefings, under oath, and to provide truthful statements concerning the nature, location, method of acquisition and other details of any and all of their joint and individual financial holdings, including but not limited to real property, personal property, stocks, bonds, securities, safe deposit boxes, foreign bank accounts, foreign investments, domestic bank accounts, and domestic investments.

4. Any and all real property, personal property, money, stocks, bonds, securities, and other things of value owned by Mr. or Mrs. Burns will be conveyed and surrendered to the United States. Any and all property or things of value transferred in any way by Mr. or Mrs. Burns to persons, other than bona fide purchasers for value, will be recovered by Mr. or Mrs. Burns and conveyed and surrendered to the United States. The only exceptions to this are the following items to be retained by Mrs. Burns:

   a. Property and funds which Mrs. Burns can establish were not acquired with any funds provided by Mr. Burns nor derived in any way from Mr. Burns;

   b. One automobile and funds in the amount of $10,000, to the extent Mrs. Burns' funds and property referenced in sub-paragraph (a), apart from necessary household and certain personal items, do not amount to this figure; and

   c. Necessary household items, one wedding and engagement ring set, and the wedding gifts listed on Exhibit B to this agreement.

5. Mr. Burns will execute an agreement with the United States, which is not dischargeable in bankruptcy, wherein if he acquires funds over a specified value he will agree to pay to the United States the difference between the liquidated value of the property conveyed and surrendered to the United States under paragraph 4

above and the total amount the United States has lost as a result of his criminal acts throughout the period of his government employment.

6. The United States will not prosecute Mr. Burns for any other criminal activity related to this matter. All charges currently pending and not incorporated in this agreement will be dismissed by the United States after Mr. Burns' plea has been accepted by the Court.

7. Any statements made by Mr. or Mrs. Burns pursuant to this agreement will not be used against the person making the statement in any subsequent criminal proceeding other than perjury, making a false statement, or enforcement of this agreement. This grant of use immunity is understood by all parties to be only as extensive as the immunity provided for in 18 U.S.C. 6001 et seq., except that the United States is free to use information derived from such statements against the person making the statements.

8. The United States will bring no criminal charges against Mrs. Burns in relation to this matter.

9. Nothing in this agreement affects or is intended to affect any civil tax liability of Mr. and/or Mrs. Burns.

10. If it is determined by the United States that Mr. or Mrs. Burns has knowingly given false, incomplete, or misleading testimony or information, or has failed in any way to fulfill completely each and every one of their respective obligations under this agreement, they will be in violation of this agreement and the United States will be released from its commitment to honor any and all of its obligations under this agreement. Mr. and Mrs. Burns understand and explicitly agree that if they fail to fulfill any of their respective obligations under this agreement, including the giving of truthful information, the United States would be free, where appropriate in its discretion, to prosecute either or both of them for perjury, false statements, and/or obstruction of justice, to move to vacate Mr. Burns' guilty plea, and to nullify this agreement in its entirety.

11. No promises, representations, or inducements have been made to Mr. and Mrs. Burns other than what is contained in this letter. Any changes to this agreement must be made in writing and signed by all parties.

If this agreement comports with the understanding of all parties please signify so by having all parties sign it below.

Sincerely,

James M. Cole
Counsel for the United States

United States District Court
for the District of Columbia
A TRUE COPY
JAMES F. DAVEY, CLERK
By _____ Deputy Clerk
10/12/88

Michael K. Fee
Counsel for the United States

We have consulted with our attorneys and fully understand all of our rights in relation to this matter. We have read the foregoing agreement between the United States of America and William J. Burns and Kathy Burns and have carefully reviewed every part of it with our attorneys. We understand all of the terms and agree to them.

8-11-88
DATE

WILLIAM J. BURNS

8-11-88
DATE

KATHY BURNS

We are the attorneys for William J. Burns and Kathy Burns. We have fully explained their respective rights to them in relation to this matter. We have carefully reviewed every part of this plea agreement with Mr. and Mrs. Burns. To our knowledge, their decision to enter into this agreement is an informed and voluntary one.

8/11/88
DATE

DAVID R. ADDIS
Counsel for William J. Burns

8/11/88
DATE

ALBERT H. TURKUS
Counsel for Kathy Burns

AGREEMENT

This Agreement sets forth the terms and procedures through which WILLIAM J. BURNS will satisfy his obligation to make restitution to the United States of America in the amount of $1,371,779.94, which, according to WILLIAM J. BURNS, represents the total amount of funds he obtained from the United States of America through his scheme of theft and false claims in the name of Vincent Kauffman. Should evidence come to the attention of the United States which establishes that WILLIAM J. BURNS has illegally obtained funds from the United States above and beyond this restitution figure, that additional amount will not be covered by this Agreement nor will it be in any way effected by this Agreement. It will, however, be due and owing to the United States pursuant to paragraph 5 of the Plea Agreement of August 11, 1988, which is hereby incorporated into this Agreement in its entirety and is attached hereto as Attachment A. The scheme of theft and false claims against the United States of America was acknowledged by WILLIAM J. BURNS in the United States District Court on August 11, 1988, and formed the basis for a three-count criminal information to which WILLIAM J. BURNS pled guilty. WILLIAM J. BURNS pled guilty to the criminal information pursuant to a Plea Agreement. This Agreement between the United States of America and WILLIAM J. BURNS is entered into pursuant to the Plea Agreement executed by the parties and filed in the United States District Court for the District of Columbia on August 11, 1988.

Accordingly, for and in consideration of the mutual promises and truthful representations made in this Agreement and the Plea

Agreement which is incorporated herein, the United States of America and WILLIAM J. BURNS agree as follows:

1. WILLIAM J. BURNS hereby agrees to assign, transfer, deliver, and convey to the United States all of his real property, personal property, money, stocks, bonds, and any and all other things of value including but not limited to the items specified in this agreement and its attachments.

a. Real Property: WILLIAM J. BURNS represents that the only real property he owns and the only real property he acquired with the proceeds of his scheme is a residence known as 3048 Brownstone Court, Burtonsville, Maryland, more particularly described in a deed on record in Montgomery County, Maryland as "Lot numbered Eighteen (18) in Block 'D' in the subdivision known as 'FAIRLAND GARDENS' as per plat recorded in Plat Book 122 at Plat 14366 among the Land Records of Montgomery County, Maryland." (hereinafter the "residence"). WILLIAM J. BURNS agrees that the afore-described residence and surrounding property, structures, appurtenances, improvements, and fixtures thereon shall be sold and the proceeds shall be assigned and delivered to the United States of America. WILLIAM J. BURNS agrees that he will permanently vacate the residence prior to October 14, 1988, the date upon which WILLIAM J. BURNS is to be sentenced in the United States District Court for the

District of Columbia. WILLIAM J. BURNS further agrees that he will cooperate fully with the United States and will execute any and all powers of attorney and other documents necessary to accomplish the sale of the residence and its transfer to a buyer. Upon the execution of powers of attorney and any other necessary documents by WILLIAM J. BURNS, and delivery of those documents to the United States, WILLIAM J. BURNS agrees that he relinquishes all title, right, claim, or interest which he may have in the residence, or the proceeds derived from its sale. WILLIAM J. BURNS agrees that he will cooperate with, and not interfere with or obstruct in any way the sale of the residence.

b. Vehicles: WILLIAM J. BURNS agrees that through this Agreement, title to the vehicles identified in Attachment B are hereby transferred to the United States so that they may be sold. WILLIAM J. BURNS agrees to execute any and all documents to effect the transfer and that upon transfer of these vehicles, any right or interest he may have in the vehicles or the proceeds derived from the sale of the vehicles shall terminate.

c. Personal Property: WILLIAM J. BURNS agrees that upon execution of this Agreement, all right, title and interest which he may have in the property identified in Attachment C, and any other property he may own individually or

not been liquidated, expended, or obligated for attorneys expenses or living expenses as of the date upon which this Agreement is executed, shall be and hereby are irrevocably transferred to the United States of America.

e. Accounting: The property herein transferred to the United States shall be liquidated and sold by the United States. Notice of the date, location, and method of the liquidation and sale will be provided to WILLIAM J. BURNS at least two weeks prior to the sale. Upon completion of the liquidation or sale of all property encompassed by this Agreement, the United States shall provide WILLIAM J. BURNS with a figure constituting the total net proceeds of the liquidation and sale. This figure, plus any residuum from paragraph "d" above, shall be subtracted from the total amount of restitution WILLIAM J. BURNS owes to the United States. The resulting difference shall be the outstanding restitution amount for which WILLIAM J. BURNS shall remain obligated to the United States. This outstanding restitution obligation shall be the sole obligation of WILLIAM J. BURNS and shall not be the responsibility of his wife or heirs.

2. WILLIAM J. BURNS agrees that for purposes of paying the outstanding restitution amount, the following conditions shall apply: (1) he shall annually pay over to the United States fifty percent (50%) of all his gains and earnings above a yearly income

of forty-thousand dollars ($40,000); (2) he shall annually pay over to the United States one-hundred percent (100%) of all his gains and earnings above a yearly income of seventy-thousand dollars ($70,000); (3), for purposes of this Agreement, the yearly income of WILLIAM J. BURNS shall be his adjusted gross income for federal income tax purposes, plus any real or personal property, chose in action, or cash received by him as a prize, windfall, gift, or inheritance during the calendar year. Yearly income of WILLIAM J. BURNS shall also include income of whatever kind derived by WILLIAM J. BURNS from a sole proprietorship, partnership, corporation, or trust created by WILLIAM J. BURNS or in which WILLIAM J. BURNS has a substantial interest; (4) the threshold yearly income amounts of $40,000 and $70,000 shall be adjusted, if necessary, for inflation at a rate consistent with the Consumer Price Index; (5) payments towards the outstanding restitution amount as prescribed in this Agreement shall be made in the form of a certified check or money order made payable to the "United States Treasury" and delivered to the Inspector General for the United States Agency for International Development; (6) payments required by this Agreement shall be made on or before May 15 of each calendar year; (7) for purposes of documenting his yearly income, WILLIAM J. BURNS agrees to submit to the Inspector General for the United States Agency for International Development a sworn, notorized statement setting out his adjusted gross income from his federal income tax return, plus any other gains and income not listed on the tax return. This statement shall be delivered to the Inspector General for

the United States Agency for International Developement by May 1st of each year until the outstanding restitution obligation has been satisfied.

3. WILLIAM J. BURNS agrees to release all claims on all monies due WILLIAM J. BURNS as a result of his employment with the United States Agency for International Development. This amount includes $30,286.78 in retirement funds, $1,788 held in the Thrift Savings Plan, and $1,967.94 in accrued annual leave. Upon execution of this Agreement, all right title and interest in these funds shall be and hereby are transferred irrevocably to the United States and shall be applied to WILLIAM J. BURNS' total restitution obligation to the United States.

4. The property transfers set forth in this Agreement shall be binding upon the heirs, administrators, executors, successors, and assigns of WILLIAM J. BURNS.

5. This Agreement in no way effects the rights or obligations of any person not a party to this Agreement as to any of the property or other items covered by this Agreement.

6. As provided in the Plea Agreement (Attachment A), in no event do the terms of this Agreement encompass or affect in any way any civil tax liability of WILLIAM J. BURNS.

7. In no event is it intended that this Agreement encompass or affect on any way any fines, special assessments or other financial penalties which may be imposed at sentencing by the United States District Court for the District of Columbia.

8. In no event may the restitution obligation of WILLIAM J. BURNS described in this Agreement be dischargeable in bankruptcy or be reduced through any means other than payment.

IN WITNESS WHEREOF, the United States, through its undersigned attorney and authorized representative, WILLIAM J. BURNS and his attorney, have hereunto set their hands:

I am WILLIAM J. BURNS and I have consulted with my attorney concerning my rights and obligations under this Agreement. I fully understand the terms of this Agreement and I am executing this Agreement pursuant to the Plea Agreement (Attachment A) which I entered into voluntarily.

10/14/88
DATE

WILLIAM J. BURNS

I am David R. Addis, Esq., attorney for WILLIAM J. BURNS. I have carefully explained the terms of this Agreement in its entirety to my client.

10/14/88
DATE

David R. Addis, Esq.
Attorney for William J. Burns

JAMES M. COLE
Attorney for the
United States of America

10/14/88
DATE

HUMANITARIAN FUNCTIONS.

NOW, IT CAN BE NOTED THAT THE MONEY THAT MR. BURNS TOOK MIGHT HAVE BEEN FROM A LEFTOVER TRAVEL FUND HERE OR THERE, BUT THESE UNUSED FUNDS WHICH HE DID TAKE WOULD HAVE GONE INTO THE COFFERS OF A.I.D., COULD HAVE GONE INTO MANY OTHER AREAS TO DO GOOD WORK. THIS IS SOMETHING WHICH SHOULD BE CONSIDERED ON THE SIDE OF HARM, WHICH SHOULD BE CONSIDERED AS TO THE LEVEL OF PUNISHMENT THAT'S APPROPRIATE.

MUCH CAN BE SAID ABOUT THE LAXNESS WITH WHICH A.I.D. HAD TREATED SOME OF THIS MONEY AND ITS ACCOUNTING PROCEDURES ON THE MONEY, CREATING PERHAPS A TARGET OF OPPORTUNITY FOR MR. BURNS. BUT WHAT MUST BE REMEMBERED IS THAT MR. BURNS WAS PUT IN THE POSITION OF TRUST AT A.I.D. TO PROTECT THE PUBLIC'S MONEY IN THESE KINDS OF ENDEAVORS AND HE WAS CHARGED WITH MAKING SURE IT WENT WHERE IT WAS SUPPOSED TO GO. HE WAS THE CONTROL.

MR. BURNS WAS NOT A MASTER CRIMINAL. HE WAS A PERSON WHO WAS GIVEN SOME TRUST. HE WAS ASKED TO PROTECT MONEY AND HE ABUSED THAT TRUST IN AN EXTREME FASHION.

IT IS ALWAYS SAD WHENEVER A PERSON WHO IS IN A PUBLIC OFFICE ABUSES THE TRUST THAT THEY ARE GIVEN IN THAT OFFICE. THERE ARE UNDOUBTEDLY OTHERS IN OTHER GOVERNMENTS AGENCIES WHO ARE IN A SIMILAR SITUATION AS MR. BURNS HAD OCCUPIED AT A.I.D. AND THIS SENTENCE THAT YOU GIVE TODAY, YOUR HONOR, MUST SEND A MESSAGE OF DETERRENCE TO THOSE PEOPLE.

WE ARE THEN LEFT WITH THE ENORMITY OF MR. BURNS' CRIME.

RESTITUTION AND THAT YOU CHOOSE TO PAY BACK ALL THAT YOU STOLE, BUT THE TRUTH OF THE MATTER IS IF THERE HAD NOT BEEN AN INVESTIGATION, THERE IS NO REASON FOR ME TO BELIEVE THAT IT WOULD HAVE STOPPED IN MAY OF '88. IT STOPPED IN MAY OF '88 BECAUSE OF AN INVESTIGATION.

YOU, AN EMPLOYEE FOR OVER 20 YEARS, NOT ONLY WERE YOU APPARENTLY TRUSTED BY YOUR EMPLOYERS, BUT YOU HAD TAKEN AN OATH TO PERFORM YOUR JOB AND ONLY YOUR JOB. YOU VIOLATED THAT OATH. YOU VIOLATED EVERY BIT OF TRUST THAT ANYONE HAD PUT IN YOU.

AND, YES, I KNOW YOU HAVE EXPERIENCED SELF-PUNISHMENT. MOST PEOPLE WHO COMMIT CRIMES DO EXPERIENCE SELF-PUNISHMENT, BUT THAT IS NOT WHAT SENTENCING IS FOR. SENTENCING IS NOT DESIGNED TO SEE IF YOU HAVE PUNISHED YOURSELF BUT TO EXACT THAT WHICH THE STATE BELIEVES IS AN APPROPRIATE SANCTION FOR YOUR CRIMINAL CONDUCT. THAT'S WHAT SENTENCING IS FOR.

THE GUIDELINES WHICH APPLY TO THIS CASE DO INDEED REFLECT THAT THE APPROPRIATE SENTENCE IS WITHIN THE RANGE OF 30 TO 37 MONTHS. OR IS IT 31 TO 37?

MR. ADDIS: I BELIEVE IT'S 31 TO 37, YOUR HONOR.

THE COURT: ALL RIGHT, 31 TO 37 MONTHS. BUT I HAVE CONSIDERED THIS MATTER AND I BELIEVE, MR. BURNS, THAT THE APPROPRIATE SENTENCE CAN ONLY BE EFFECTED IF THE COURT DEPARTS FROM THE GUIDELINES. UNDER THE APPROPRIATE CIRCUMSTANCES, THE COURT MAY DEPART FROM THE SENTENCE IMPOSED BY THE GUIDELINES. TITLE 18, SECTION 3553(B) OF THE UNITED STATES CODE AUTHORIZES A

DEPARTURE FROM THE SENTENCING GUIDELINES WHEN THE COURT FINDS THAT THERE EXISTS AN AGGRAVATING OR A MITIGATING CIRCUMSTANCE OF A KIND OR TO A DEGREE NOT ADEQUATELY TAKEN INTO CONSIDERATION BY THE SENTENCING COMMISSION IN FORMULATING THE GUIDELINES.

IN ITS POLICY STATEMENT, THE U.S. SENTENCING COMMISSION STATES THAT, "THE PRESENCE OF FACTORS NOT ADEQUATELY CONSIDERED IN THE GUIDELINES MAY, IN THE DISCRETION OF THE SENTENCING JUDGE, WARRANT DEPARTURE FROM THE GUIDELINES. MOREOVER, THE COURT MAY DEPART FROM THE GUIDELINES EVEN THOUGH THE REASON FOR DEPARTURE IS LISTED ELSEWHERE IN THE GUIDELINES IF THE COURT DETERMINES THAT IN LIGHT OF UNUSUAL CIRCUMSTANCES THE GUIDELINE LEVEL ATTACHED TO THAT FACTOR IS INADEQUATE."

FURTHER, THE COMMISSION STATED THAT, AND I QUOTE, "THE CONTROLLING DECISION AS TO WHETHER AND TO WHAT EXTENT DEPARTURE IS WARRANTED CAN ONLY BE MADE BY THE COURT AT THE TIME OF SENTENCING."

THUS, THE GUIDELINES EXPRESSLY AUTHORIZE THE SENTENCING JUDGE TO CONSIDER CIRCUMSTANCES AT SENTENCING THAT MAY JUSTIFY DEPARTURE FROM THE ESTABLISHED GUIDELINES.

I FIND AT LEAST THREE FACTORS THAT I BELIEVE ARE INVOLVED IN YOUR OFFENSES WHICH I FEEL THE GUIDELINES EITHER FAIL TO ADDRESS OR TO CONSIDER ADEQUATELY.

FIRST, I FIND THAT THE GUIDELINES, IN CONSIDERING THE SEVERITY OF THE OFFENSES, DO NOT SUFFICIENTLY WEIGH THE DURATION OF YOUR CRIMINAL CONDUCT. YOU HAVE PLED GUILTY TO AND THUS

CONFESSED TO THEFT FROM THE UNITED STATES GOVERNMENT FOR AT LEAST SIX YEARS, FROM FEBRUARY 25, 1982, TO MAY 26, 1988. I ADMIT THAT I RECOGNIZE THAT THE STATUTE OF LIMITATIONS IS ONLY FIVE YEARS, ALL RIGHT.

THROUGHOUT THE COURSE OF THESE YEARS YOU CAUSED OVER 53 DIFFERENT FRAUDULENT CHECKS TO BE ISSUED BY THE UNITED STATES GOVERNMENT.

WHILE THE GUIDELINES PERMIT ME TO CONSIDER THE LEVEL OF PLANNING INVOLVED IN THE OFFENSE AND THE AMOUNT OF MONEY STOLEN, I CANNOT IGNORE THE NUMBER OF YEARS AND THE AMOUNT OF FRAUDULENT TRANSACTIONS PLANNED, SCHEMED AND EXECUTED BY YOU, AND I DO NOT BELIEVE THAT THEY WERE CONSIDERED BY THE GUIDELINES OR, IF SO, ADEQUATELY CONSIDERED.

I FIND IT SIGNIFICANT THAT YOU PERSISTED FOR OVER FIVE YEARS IN PERPETRATING THIS CRIMINAL ACTIVITY AGAINST THE TAXPAYERS OF THE UNITED STATES. THE FAILURE OF THE SENTENCING GUIDELINES TO ACCOUNT FOR THIS, I BELIEVE, IS A GROUND FOR DEPARTURE FROM THE GUIDELINES.

MOREOVER, WHILE THE GUIDELINES DO TAKE INTO CONSIDERATION THE FACT THAT YOU VIOLATED THE PUBLIC TRUST IN COMMITTING THESE CRIMES, THE COURT FINDS THAT THERE WAS MORE INVOLVED IN YOUR ACTS OF THEFT AND FALSE CLAIMS THAN A MERE VIOLATION OF PUBLIC DUTY. YOU ABUSED A PROCESS RELIED UPON BY THE GOVERNMENT TO PAY THOSE WHO PERFORM IMPORTANT AND LEGITIMATE SERVICES FOR THE UNITED STATES. IN TAKING ADVANTAGE OF THIS

VITAL SYSTEM OF REMUNERATION OVER SUCH A LENGTHY PERIOD OF TIME, YOU HAVE DISRUPTED THE FUNCTIONS OF THE GOVERNMENT IN ADDITION TO VIOLATING THE PUBLIC TRUST.

AS I EARLIER INDICATED, YOU ALSO TOTALLY VIOLATED YOUR OATH OF EMPLOYMENT BY YOUR DEVIOUS CONDUCT OVER MANY YEARS. A MILLION THREE COULD HAVE BEEN STOLEN AT ONE TIME, BUT IF A MILLION THREE HAD BEEN STOLEN AT ONE TIME FROM A.I.D., IT WOULD HAVE BEEN RECOGNIZED. YOU, IN YOUR DEVIOUS MANNER, STOLE AT A RATE THAT MADE IT DIFFICULT FOR IT TO HAVE BEEN EASILY ASCERTAINED.

THE SENTENCING GUIDELINES PERMIT DEPARTURE WHEN "THE DEFENDANT'S CONDUCT RESULTED IN A SIGNIFICANT DISRUPTION OF A GOVERNMENTAL FUNCTION, AND THE COURT MAY INCREASE THE SENTENCE ABOVE THE AUTHORIZED GUIDELINE RANGE."

THE COURT FINDS THAT YOU CAUSED SIGNIFICANT GOVERNMENTAL DISRUPTION BY STEALING GOVERNMENT FUNDS IN EXCESS OF ONE MILLION DOLLARS AND BY WAY OF 53 SEPARATE FRAUDULENT INSTRUMENTS.

FINALLY, THE GUIDELINES PERMIT THE COURT TO DEPART FROM THE PRESCRIBED SENTENCE IF THE DEFENDANT COMMITTED THE OFFENSE IN ORDER TO FACILITATE OR CONCEAL THE COMMISSION OF ANOTHER OFFENSE.

IN THIS CASE, I REFER TO COUNT THREE IN WHICH YOU FAILED TO REPORT THE STOLEN INCOME FOR CALENDAR YEARS 1982 THROUGH 1987, RESULTING IN A TAX OBLIGATION OF ALMOST HALF A

MILLION DOLLARS. BY CONTINUALLY EVADING THE PAYMENT OF YOUR TAXES, YOU WERE ALSO ABLE TO CONCEAL CRIMES OF THEFT AND FALSE CLAIMS. CERTAINLY, IF YOU HAD NOT CONCEALED THIS, YOUR CRIMES WOULD HAVE BEEN DISCOVERED MUCH EARLIER.

FOR THESE REASONS, I FIND THAT SEVERAL IMPORTANT ELEMENTS OF THE CRIMES COMMITTED BY YOU ARE NOT ADEQUATELY CONSIDERED BY THE SENTENCING GUIDELINES, THUS WARRANTING A DEPARTURE FROM ITS PRESCRIPTION.

THIS BEING THE CASE, THE COURT RELIES UPON ITS OWN JUDGMENT AND EXPERIENCE AND FINDS THAT THE GUIDELINE RANGE FOR THE OFFENSES WHICH YOU COMMITTED MUST BE DEPARTED FROM.

PURSUANT TO THE SENTENCING REFORM ACT OF 1984, MR. BURNS, IT IS THE JUDGMENT OF THIS COURT THAT YOU SHALL BE COMMITTED TO THE CUSTODY OF THE BUREAU OF PRISONS FOR A TERM OF 60 MONTHS. UPON RELEASE FROM IMPRISONMENT, YOU SHALL BE PLACED ON SUPERVISED RELEASE FOR A PERIOD OF THREE YEARS. THE CONDITIONS OF SUPERVISED RELEASE WILL INCLUDE THE FOLLOWING:

THAT YOU ABIDE BY THE STANDARD CONDITIONS OF SUPERVISED RELEASE RECOMMENDED BY THE SENTENCING COMMISSION, THAT YOU DO NOT COMMIT ANOTHER FEDERAL, STATE OR LOCAL CRIME, THAT YOU PAY A SPECIAL ASSESSMENT TO THE UNITED STATES OF 50 DOLLARS ON EACH OF THE THREE COUNTS OF THE INFORMATION FOR A TOTAL OF 150 DOLLARS, THAT YOU PROVIDE TO THE PROBATION OFFICER ACCESS TO ANY REQUESTED FINANCIAL INFORMATION, AND THAT YOU CONTRIBUTE 200 HOURS OF COMMUNITY SERVICE -- I'M SORRY -- THAT YOU CONTRIBUTE

100 HOURS OF COMMUNITY SERVICE PER YEAR UPON YOUR RELEASE FROM CONFINEMENT.

THE COURT FINDS THAT RESTITUTION HAS BEEN ACHIEVED THROUGH THE PLEA -- IS IT CALLED A PLEA? IT'S NOT CALLED A PLEA AGREEMENT.

MR. COLE: WE HAVE REFERRED TO IT IN THE OTHER AGREEMENTS, YOUR HONOR, AS A PLEA AGREEMENT.

THE COURT: ALL RIGHT. IT'S A RESTITUTION AGREEMENT.

MR. COLE: SUBSEQUENT AGREEMENTS WOULD JUST BE AN AGREEMENT.

THE COURT: ALL RIGHT. THE AGREEMENT OF RESTITUTION. SO THE COURT WILL THEREFORE NOT ORDER ANY SPECIAL RESTITUTION.

THE COURT DOES FIND THAT BASED UPON THIS AGREEMENT THAT YOU HAVE ENTERED INTO WITH THE GOVERNMENT THIS DATE THAT YOU WILL PERHAPS NOT HAVE THE ABILITY TO PAY A FINE OF ANY TYPE AFTER YOUR RELEASE, AND FOR THAT REASON THE COURT DOES NOT ORDER YOU TO PAY A FINE. AND I WOULD ALSO SAY THAT BASED UPON THE AGREEMENT THAT I READ TODAY THAT YOU WILL NOT HAVE THE ABILITY TO PAY THE COST OF INCARCERATION, AND FOR THAT REASON THE COURT WILL NOT ORDER YOU TO PAY FOR INCARCERATION. BECAUSE, HOWEVER, YOU CANNOT PAY A FINE AND CANNOT PAY THE COST OF INCARCERATION, THEREFORE, THE COURT IS ORDERING YOU TO CONTRIBUTE THESE HOURS OF COMMUNITY SERVICE PER YEAR IN LIEU OF THE FINE PAYMENT, AND IT IS SO ORDERED.

NOW, I WOULD LIKE YOU TO KNOW, MR. BURNS, THAT SINCE I

HAVE DEPARTED FROM THE SENTENCING GUIDELINES, YOU HAVE AN ABSOLUTE RIGHT TO APPEAL YOUR SENTENCE, AND I AM SURE THAT MR. ADDIS WILL ADVISE YOU AS I AM GOING TO ADVISE YOU NOW THAT THE APPEAL MUST BE FILED WITHIN 10 DAYS OF TODAY'S DATE. IF YOU NO LONGER HAVE THE FUNDS TO NOTE AN APPEAL OR TO RETAIN COUNSEL FOR YOUR APPEAL, THE COURT OF APPEALS WILL PERMIT YOU TO FILE WITHOUT PREPAYMENT OF COSTS, AND THE COURT OF APPEALS WILL APPOINT COUNSEL TO REPRESENT YOU IF YOU ARE UNABLE TO RETAIN COUNSEL OF YOUR OWN.

THE DEFENDANT WILL STEP BACK WITH THE MARSHAL.

MR. ADDIS: YOUR HONOR, MAY I BE HEARD BEFORE THE DEFENDANT GOES?

THE COURT: CERTAINLY.

MR. ADDIS: YOUR HONOR, WE WOULD ASK THAT MR. BURNS BE PERMITTED TO SURRENDER HIMSELF TO A PLACE OF INCARCERATION FOR THE FOLLOWING REASONS:

FIRST OF ALL, THE GOVERNMENT HAS AGREED NOT TO OPPOSE SUCH A REQUEST, BUT WE HAVE AFFIRMATIVE REASONS FOR REQUESTING THAT. ONE, WE WOULD ASK THE COURT ULTIMATELY TO RECOMMEND TO THE ATTORNEY GENERAL THE CAMP AT ALLENWOOD FOR THIS REASON:

MRS. BURNS, THE MOTHER OF THE TWO SMALL CHILDREN, HAS A GRANDMOTHER WHO LIVES ABOUT 35 MINUTES FROM THE CAMP AT ALLENWOOD. IF YOUR HONOR WERE TO RECOMMEND THE CAMP AT ALLENWOOD, THEN MR. BURNS WOULD MOST LIKELY BE INCARCERATED THERE AND MRS. BURNS COULD THEN VISIT HIM MUCH EASILY,

on Defense Intelligence Agency payroll account); United States v. Gibbs, 704 F.2d 464, 465 (9th Cir. 1983) (officer of federally-funded American Indian Assistance corporation used corporate funds to pay numerous personal expenses). Departure from the applicable guideline range is not warranted because an offense is serious, but only because it is unusual. See Guidelines, § 5K2.0. The adjustments for more than minimal planning provide adequate additional punishment for offenses involving numerous transactions and continuing over extended periods of time. Cf. United States v. Campbell, 878 F.2d 164, 165 (5th Cir. 1989) (vacating upward departure based on amount of money involved in offense, because factor adequately considered by guideline adjustment and "not unlike that which is ordinarily involved in a mail fraud conviction"). Because the duration of the offense was adequately considered by the Commission and was not unusual, the district court's reliance on it as a basis for departure was impermissible, and the sentence must therefore be vacated.

B. The District Court's Finding That The Offense Caused A Significant Disruption Of A Governmental Function Was Erroneous Because The Record Does Not Show That The Offense Resulted In Any Disruption Of AID's Functions Beyond That Which Is Inherent In The Offense, And The Departure From The Guidelines Was Therefore Impermissible.

A sentence outside the applicable guideline range is unreasonable if it is based on a factor that, although it was not adequately considered by the Sentencing Commission in formulating the guidelines, does not exist in the circumstances

of the particular case. See Diaz-Villafane, 874 F.2d at 49. Departure from the applicable guideline range is warranted "[i]f the defendant's conduct resulted in a significant disruption of a governmental function." Guidelines, § 5K2.7. Judge Johnson's finding that this factor warranted departure was erroneous because the record does not indicate that Burns' conduct caused any disruption in the agency's function beyond that which is inherent in any offense involving theft of government property and false claims.

In a case involving exportation of handguns, the Third Circuit noted that, because public safety is a prime consideration in any restriction on guns, a departure based on significant endangerment of "national security, public health, or safety," § 5K2.14, would be permissible only where danger to the public is "'present to a degree substantially in excess of that which ordinarily is involved in the offense of conviction[.]'" Id. (quoting § 5K2.0). The Commission's policy statement on disruption of a governmental function points out that interference which is "inherent in the offense" has been considered by the Commission, so that "unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference." § 5K2.7. The district court noted that the reimbursement system Burns managed in his position with the agency is important because it is used by the government to remunerate vendors for services. (App. 32, 39). The importance of this function is undisputed, but there is no

indication beyond the district court's statements, id., and the government's allegations at the sentencing hearing, (App. 28-29), that this function was adversely affected in any unusual way.

Burns' criminal conduct was unnoticed for a period of six to eight years, and was detected only after a routine security investigation not prompted by any suspicion of Burns. (App. 7). Only upon discovering the value of Burns' home, id., and comparing it to the amount of his salary, id., did officials begin to suspect Burns of diverting funds. Id. The record contains no evidence that the agency experienced any inability to meet its obligations or support its programs. The disruption of the agency's function was thus no more significant than that which is inherent in any offense involving theft of government property or false claims, and the guidelines "reflect the appropriate punishment[.]" § 5K2.9. Therefore, the departure was unreasonable, and the sentence must be vacated.

C. The Degree Of Departure, An Increase Of Over 50% From The Applicable Guideline Range, Is Unreasonable Because It Is Greater Than Necessary To Comply With The Purposes Of Punishment Endorsed By Congress And The Sentencing Commission.

A district court may not impose sentences that are "greater than necessary[] to comply with the purposes" of punishment endorsed by Congress in the Sentencing Reform Act of 1984. 18 U.S.C. § 3553(a). Those purposes include "the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to

lasted for an unusually long time. For this reason, the district court could properly conclude that the "more than minimal planning" specific offense characteristic did not adequately describe appellant's conduct. Accordingly, the district court did not err by departing based on this ground.

3. Appellant next claims (Br. 15-17) that the district court erroneously concluded that appellant's offense disrupted a government functic- In appellant's view, the record reveals no disruption of AID's function beyond that which is inherent in the offense itself. Therefore, appellant argues, the district court could not depart on this ground either.

Guideline 5K2.7 allows a district court to depart from the Guideline sentence "[i]f the defendant's conduct resulted in a significant disruption of a governmental function." The Commission's Policy Statement on departure, Guideline 5K2.0, explains that "disruption of a government function * * * would have to be quite serious to warrant departure from the guidelines when the offense of conviction is bribery or obstruction of justice. When the offense of conviction is theft, however, and when the theft caused disruption of a government function, departure from the applicable guideline more readily would be appropriate" (emphasis added).

Here, several factors entered into the district court's conclusion that appellant had disrupted a government function within the meaning of Guideline 5K2.7. First, the court found that appellant's offenses involved "more * * * than a mere

violation of public duty. * * * [Appellant] abused a process relied upon by the government to pay those who perform important and legitimate services for the United States." App. 33, 39. The court stressed that appellant took "advantage of this vital system of remuneration over such a lengthy period of time." App. 32-33. In addition, the court thought it relevant in this respect that appellant had violated his oath of employment and "stole at a rate that made it difficult for [the thefts] to be easily ascertained." App. 33.

Under the lenient standard for departure set forth in Guideline 5K2.0, the court's findings more than suffice to justify its departure on this ground. The court's findings show that it determined that appellant's abuse of the processes for remunerating vendors at AID disrupted those processes.

Appellant's challenge to this conclusion misconstrues the meaning of the phrase "disruption of a government function." Appellant claims (Br. 16) that "the record does not indicate that [appellant's] conduct caused any disruption in the agency's function beyond that which is inherent in any offense involving theft of government property." Appellant looted an AID travel fund, however, by manipulating the AID procurement apparatus. The record shows that appellant used AID resources and manpower to accomplish his thefts, thus diverting those resources from other tasks. See App. 7 (forms used to divert funds prepared by clerk, then approved by appellant). Moreover, the checks to "Vincent Kaufman" were issued by the United States Treasury,

which presumably also has to devote time, resources, and manpower to issue a check. In short, appellant diverted the administrative apparatus of two federal departments to his own ends. This disruption of government function hardly compares to an ordinary theft of government property such as might be committed by an employee who steals an office machine.

Appellant also claims (Br. 17) that the government's failure to detect his theft over six years shows that it did not disrupt a government function. Appellant's skill at concealing his theft should not be rewarded, however. More importantly, the size of the federal government and the reach of its functions counsels against conditioning the application of Guideline 5K2.7 on whether a defendant's theft is detected. This is especially true where, as here, the theft caused measurable disruption and diversion of government resources.

In sum, appellant has not shown that the district court relied on impermissible factors to justify its upward departure from the Guidelines sentence. To the contrary, the record shows that the district court carefully considered the Guidelines in calculating appellant's sentence and decided that the Guidelines did not adequately evaluate appellant's behavior. Thus, the court did not err by departing from the Guidelines.[7]

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[7] For this reason, this Court need not consider appellant's contention (Br. 9 n.7) that if any of the factors relied on by the district court is impermissible, then the court's sentence must be vacated. We note, however, that the courts of appeals have not taken a unanimous view of this issue. Compare United States v. Rodriguez, No. 88-3604, slip op. at 16 (6th Cir., August 15, 1989) ("[w]hile one of the factors found in the

B. **Nothing In The Record Suggests That Burns' Conduct Caused A Significant Disruption Of AID's Function; Therefore, The District Court's Departure On The Basis Of Guidelines § 5K2.7 Was Improper.**

When a court of appeals determines that a district court relied upon a permissible ground for an upward departure, it should then decide whether the record provides a factual basis to support that ground in that particular case. See Brief of Appellant at 5-8; Joan, 883 F.2d at ___, 1989 U.S. App. Lexis at 10; Hernandez-Vasquez, 884 F.2d at ____, 1989 U.S. App. Lexis at 2 (where causing a high speed chase was proper reason for departure, but defendant was not car's driver and evidence did not show that he was responsible, departure on that ground was improper). Where a defendant's conduct results in significant disruption of governmental function, the district court may "increase the sentence above the authorized guideline range to reflect the nature and extent of the disruption and the importance of the governmental function affected." Guidelines § 5K2.7. While the Government rightly notes that the level of disruption required to trigger an upward departure may be less in theft cases than in cases of bribery or obstruction of justice, Guidelines § 5K2.0 and Brief of Appellee at 18, the record must nonetheless reflect that the theft has caused some discernable level of disruption. The district judge, however, made no

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flies directly in the face of the Guidelines policy which states that courts should rarely depart. Guidelines § 1A4(b), para. 3 ("despite courts' legal freedom to depart from the guidelines, they will not do so very often").

reference to the nature or extent of any disruption, and, moreover, she identified no governmental function that Burns' conduct disrupted. The Government indicates that language in the sentencing order supports the judge's finding that significant governmental disruption existed in this case, Brief of Appellee at 18-19, but the district judge referred to no factors having any relationship to a disruption of governmental function.[11]

The function of AID is carrying "out bilateral development assistance programs."[12] In addition, the agency also "supports the overseas humanitarian relief and development programs of U.S. private and voluntary organizations and assists development-related research in U.S. Universities."[13] Nothing in the record indicates that Burns' conduct disrupted this function in any way. Indeed, the Government acknowledges that the funds Burns diverted were from an "unused" travel fund. Brief of Appellee at 2.

If significant disruption of government function exists in this case, the standard for an upward departure on those grounds will be such that any theft from the government will require an

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11 See Brief of Appellee at 18-19: "[t]he court found that [Burns'] offenses involved 'more * * * than a mere violation of public duty. * * * [he] abused a process relied upon by the government to pay those who perform important and legitimate services for the United States.'" Judge Johnson also stated that "[t]he Court finds that [Burns] caused significant governmental disruption by stealing government funds in excess of one million dollars, over a six year period, and by way of fifty-three separate fraudulent instruments." (App. at 40); see also (App. at 33).

12 OMB, Budget of the United States Government, 5-20 (FY 1987).

13 Id.

upward departure from the applicable guideline range. Indeed, the level of disruption the Government has established in this case is comparable to that caused by their hypothetical office machine stealing employee. See Brief of Appellee at 20. While the record reveals that Burns used a clerk to fill out travel vouchers for him, diversion of the clerk's clerical time did not affect the AID's function. Even the time required for a clerk to fill out a form 53 times over six years could not significantly disrupt AID.[14]

During the fiscal years 1983-85, the budget for AID was just under $2,000,000,000. OMB, Budget of the United States Government, 5-21 (FY 1984). The budget during fiscal years 1986-88 was just over $2,000,000,000, OMB, Budget of the United States Government, 5-19 (FY 1987), resulting in a total budget of nearly 12,000,000,000 over six years. An unnoticed theft of $1,200,000 over six years, representing a mere .001% of AID's budget, could not significantly disrupt a $12,000,000,000 agency.[15]

C. The Extent Of The District Court's Departure Was Improper Because The Sentence Is Greater Than Necessary To Comply With The Purposes Of Sentencing And Because The Reasons For The Departure Do Not Justify Its Length.

A Court of Appeals must determine, as part of its review of

[14] Neither could the printing of 53 checks over six years significantly disrupt the U.S. Treasury's function of printing checks for the federal government.

[15] The Government argues that Burns should not be "rewarded" for the government's failure to detect his crime. Brief of Appellee at 20. However, Burns' argument is certainly not founded on a request to be rewarded for his offenses. Rather, he simply asks that he not receive any unauthorized extra punishment.

broad discretion of a sentencing court in evaluating the length of the sentence, could the defendant's "right to appeal the district court's departure . . . afford[] the same opportunity to challenge the grounds for departure," Brief of Appellee at 26, that was lost in the district court.

Factual disputes remain unresolved here on appeal because the district court did not follow any procedure designed to air and resolve disputes at that level.[20] Such a procedure may add several steps to the pre-sentencing process, such as the court providing to counsel notice of intent and reasons to depart prior to the sentencing hearing, counsel having an opportunity to respond, and the court making findings on disputed issues.[21] However, in terms of judicial economy, any "cumbersome," see Brief of Appellee at 25, nature of these proceedings pales in comparison to the inefficiency of unnecessary appellate review and potential remands for resolution of disputed factors.

CONCLUSION

For the foregoing reasons, Mr. Burns respectfully requests that this Court vacate his sentence and remand this case to the district court with instructions either to resentence him within the applicable Guideline range of 30-37 months, or to resentence him after conducting evidentiary proceedings consistent with Fed. R. Crim. P. 32(a) and § 6A1.3 of the Sentencing Guidelines.

[20] Contrary to the Government's assertion, Burns' sentence does not rest on undisputed facts. See Brief of Appellant at 15-17; Brief of Appellee at 18-20; infra at pp. 10-12.

[21] These procedures all accord with Guidelines §§ 6A1.1-6A1.3.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that one (1) copy of the foregoing petition for certiorari, filed on behalf of Petitioner William J. Burns was mailed, postage prepaid, to: Kenneth W. Starr, Esquire, Solicitor General of the United States, Department of Justice, 10th Street and Constitution Avenue, N.W., Room 5143, Washington, D.C. 20530 on this 19th day of April, 1990.

STEVEN R. GOLDBLATT

No. 89-7260

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

WILLIAM J. BURNS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

JOHN G. ROBERTS, JR.
Acting Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

J. DOUGLAS WILSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the district court was required to notify the defendant in advance that it intended to depart upward from the range of sentences prescribed by the Sentencing Guidelines.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

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OPINION BELOW

The opinion of the court of appeals, Pet. App. A1-A7, is reported at 893 F.2d 1343.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1990. A petition for rehearing with suggestion of rehearing en banc was denied on March 15, 1990. Pet. App. A16-A17. The petition for a writ of certiorari was filed on April 19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a guilty plea in the United States District Court for the District of Columbia, petitioner was convicted on one count of theft of government funds, in violation of 18 U.S.C 641; one count of making false claims against the government, in violation of 18 U.S.C. 287; and one count of attempting to evade the payment of income taxes, in violation of 26 U.S.C. 7201. Petitioner was sentenced to 60 months' imprisonment, to be followed by three years' supervised release. The court of appeals affirmed. Pet. App. A1-A7.

1. Between 1982 and 1988, petitioner used his position as a supervisor in the Financial Management Section of the Agency for International Development (AID) to divert AID funds from an unused travel account to a bank account in the name of Vincent Kaufman. Petitioner justified these disbursements as payments to Kaufman for moving furniture for AID. Kaufman, however, did not exist; petitioner controlled the Kaufman account. In all, petitioner diverted approximately $1,200,000 to his own pocket through the scheme. Petitioner failed to pay $475,685 in federal taxes on the income he received through the embezzlement scheme. Pet. App. A2; Gov't C.A. Br. 3.

Petitioner agreed to plead guilty pursuant to a plea agreement with the government. In the agreement, the parties stipulated that petitioner would be sentenced under the Sentencing Guidelines and that petitioner's offense level under the Guidelines would be set at 19 and his criminal history category at I. The presentence report prepared by the Probation Office

agreed with that calculation. Based on those figures, the Guidelines provided for a sentence of 30 to 37 months' imprisonment. Pet. App. A3.

At the sentencing hearing, petitioner's counsel urged the district court to impose a sentence within the Guidelines range. Gov't C.A. Br. 4. The district court declined to do so. It departed upward from the Guidelines range because petitioner's offense was of unusual duration, because petitioner had abused the process on which the government relied to pay legitimate vendors, and because petitioner's evasion of income taxes allowed him to conceal his theft of government funds. For these reasons, the district court sentenced petitioner to 60 months' imprisonment. Pet. App. A3. Petitioner did not object to the district court's failure to inform him that it was considering an upward departure from the Guidelines range, nor did he object that the grounds of departure came as a surprise.

2. The court of appeals held that the district court's grounds for departing upward from the Guidelines range were proper and that the sentence imposed was reasonable. Pet. App. A4-A5. The court of appeals further held that the district court did not err by failing to notify petitioner in advance that it planned to depart from the Guidelines range or of its basis for doing so. Pet. App. A6. It found nothing in Federal Rule of Criminal Procedure 32 or the Guidelines themselves that required such notice. Moreover, the court of appeals reasoned that petitioner was not harmed by the lack of notice because he had an

opportunity to address the court prior to sentencing and because he had the right to appeal his sentence. Finally, the court noted that all of the facts that formed the basis for the district court's decision to depart were contained in the presentence report and petitioner had the opportunity to challenge any of those facts if he thought they were erroneous. Pet. App. A6.

ARGUMENT

Petitioner contends that the district court violated Federal Rule of Criminal Procedure 32(a)(1) and Sentencing Guideline 6A1.3 by failing to give him advance notice of the court's intention to depart from the sentence prescribed by the Sentencing Guidelines and an opportunity to comment on the grounds for the proposed departure. Pet. 8-14. The court of appeals' decision is correct and does not warrant this Court's review.

1. Federal Rule of Criminal Procedure 32 governs the imposition of sentence. Rule 32(a)(1) requires that counsel for both the defendant and the government be provided with notice of the probation officer's determination of the applicable sentencing classifications and guideline range and be afforded "an opportunity to comment upon [that] * * * determination and on other matters relating to the appropriate sentence." Rule 32(c)(3)(D) provides that the court must make findings resolving all factual disputes that might bear on the sentence. And Rule 32(a)(1)(B) & (C) requires the court to hear the defendant's and

counsels' allocution on matters relating to the sentence. Sentencing Guideline § 6A1.3 correspondingly provides that the parties shall be granted adequate opportunity to contest any factor important to the sentencing determination and requires the court to notify them of its tentative findings and give them an opportunity to object before sentencing.1/

The district court fully complied with those provisions in this case. The circumstances of petitioner's offenses were undisputed and were set forth in the presentence report. The parties stipulated to petitioner's offense level and criminal history category in the plea agreement, and petitioner and his counsel had an opportunity to comment on the presentence report prior to sentencing. At sentencing, petitioner's counsel discussed the nature of petitioner's offenses at length and urged the court to impose a sentence within the Guideline range. As the court of appeals observed, "[t]his is not a case in which the court is going beyond the facts in the presentence report in deciding to depart from the Guidelines." Pet. App. A6.

2. Petitioner nevertheless contends that the district court was required to inform him that it was considering departing upward from the presumptively applicable range prescribed by the Sentencing Guidelines. Neither Rule 32(a)(1) nor Sentencing

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1/ Guideline § 6A1.3 provides in part:

> When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor.

Guideline § 6A1.3 imposes such a requirement. As the court of appeals explained, "[a]lthough the defendant might have made a stronger argument for himself if he had known that the judge was intending to depart from the Guidelines and the reasons for such a departure, we do not see any language in Rule 32 or the Guidelines requiring the judge to tell the defendant he should make the best case." Pet. App. A6.

Rule 32(a) is consistent with pre-Guidelines practice on this point. Prior to the promulgation of the Guidelines, district courts were not required to inform a defendant of the grounds on which the court intended to rely in imposing a sentence. Nothing in the Guidelines or the amendment to Rule 32 that accompanied their enactment created the requirement that petitioner seeks.2/

An additional protection against an unreasonable departure -- unavailable to defendants in pre-Guidelines practice -- is the statutory provision for appellate review of the reasonableness and legality of any departure. See 18 U.S.C. 3742; see also United States v. Diaz-Villafane, 874 F.2d 43, 4950 (1st Cir.), cert. denied, 110 S. Ct. 177 (1989). In this case, for example, petitioner claimed on appeal that the district court relied on

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2/ In addition to his claims based on Rule 32 and Guideline 6A1.3, petitioner also asserts that the district court's failure to give explicit notice of its intention to depart violated the Due Process Clause. Pet. 9-10 n.5 & 13. This contention is without merit. Petitioner makes no claim that the information on which his sentence was based was unreliable, see Williams v. Oklahoma, 358 U.S. 576, 584 (1959), and the district court's compliance with Rule 32 ensured that petitioner had a meaningful opportunity to address the court regarding his sentence.

impermissible factors in deciding to depart. The court of appeals fully considered petitioner's arguments and rejected them. Petitioner does not seek review of that aspect of the judgment below.

Petitioner contends, Pet. 8-9 & n.6, that the court of appeals' decision conflicts with the decisions of the Second, Fifth, and Ninth Circuits, which have held that Rule 32(a)(1) requires a sentencing court to inform a defendant of its intention to depart and of the factors on which it intends to rely to support the departure. See United States v. Cervantes, 878 F.2d 50, 55 (2d Cir. 1980); United States v. Nuno-Para, 877 F.2d 1409, 1415 (9th Cir. 1989); United States v. Otero, 868 F.2d 1412, 1415 (5th Cir. 1989).

The decision below does not conflict with the decisions in those cases, however, because petitioner waived review of the adequacy of the district court's notice by failing to object at the sentencing hearing. As the government urged in the court of appeals, petitioner "did not object to the district court's failure to inform him of the grounds on which it proposed to depart from the Guideline sentence, and thus he is foreclosed from raising this claim in this Court. 'Any procedural objections to the sentencing hearing * * * are deemed waived by the lack of timely objection.' United States v. Valasquez, 868 F.2d 714, 715 (5th Cir. 1989)." Gov't C.A. Br. 24.

In any event, the division among the courts of appeals on the merits of the notice issue is not as sharp as petitioner

contends. In United States v. Cervantes, supra, the Second Circuit noted only that it had "serious concerns" about notice and opportunity to be heard when the district court misinformed a defendant concerning its intention to depart from the Guidelines and relied on matters not found or "highlighted" in the record. 878 F.2d at 55-56. In United States v. Otero, supra, the Fifth Circuit required the district court to give notice of its intention to depart only when the factors on which it intended to rely were not identified in the presentence report. 868 F.2d at 1415; see United States v. Michael, 894 F.2d 1457, 1461-1462 (5th Cir. 1990) (no requirement that court must give notice to defendant prior to sentencing of intention to ignore recommendation in presentence report). Here, all of the facts on which the district court relied to justify departure were set forth in the presentence report. Thus, only the Ninth Circuit's approach is at odds with the holding of the court of appeals in this case. And that court's ruling, we submit, was based on a misreading of Rule 32(a) and 18 U.S.C. 3553(d). As the court of appeals in this case pointed out, nothing in Rule 32(a) requires the court to advise the defendant that it may choose to give a sentence above the Guidelines range, and Section 3553(d) imposes no general notice requirement, but applies only to cases in which the court imposes an "order of notice" requiring the defendant to notify victims of the crime concerning the defendant's conviction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JOHN G. ROBERTS, JR.
Acting Solicitor General*/

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

J. DOUGLAS WILSON
Attorney

JUNE 1990

---

*/ The Solicitor General is disqualified in this case.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

WILLIAM J. BURNS, PETITIONER)
)
vs.) No. 89-7260
)
UNITED STATES OF AMERICA)

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the BRIEF FOR THE UNITED STATES IN OPPOSITION by first class mail on June 11, 1990.

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John G. Roberts, Jr.

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ACTING SOLICITOR GENERAL

No. 89-7260

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

WILLIAM J. BURNS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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CONSTITUTIONAL PROVISIONS

CASES

STATUTES

No. 89-7260

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

WILLIAM J. BURNS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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PETITIONER'S REPLY MEMORANDUM

Respondent, inter alia, urges that this case is not worthy of review because there is only a direct split between two circuits, and the decision below is the correct view of the law. Respondent also perfunctorily claims that despite the fact that the court below decided the issue raised here on its merits, certiorari should be denied because the issue was not preserved for review.

This reply memorandum disputes respondent's attempt to minimize the seriousness of the conflict among the courts of appeals. It identifies additional circuits which, subsequent to the filing of the Petition for Certiorari, have now joined the conflict. In petitioner's view there are now six circuits, in addition to the District of Columbia Circuit, which have addressed this issue. Three are in direct conflict with the decision below. The conflict concerns fundamental statutory and Fifth Amendment due process issues which should now be resolved by this Court.

The reply also addresses the waiver claim which was ignored by the court below and is, in any event, without merit.

1. Respondent claims in its Brief in Opposition at 8 that the decision below is in direct conflict only with the Ninth Circuit's holding in United States v. Nuno-Para, 877 F.2d 1409 (9th Cir. 1989) on the issue of required notice and opportunity to be heard prior to upward departure from the federal Sentencing Guidelines.[1]

The conflict is larger and sharper than the respondent acknowledges. Three more circuits - the First, Sixth and Seventh - have now addressed this issue and at least one of these decisions is squarely in conflict with the decision below. United States v. Anders, 899 F.2d 570 (6th Cir. 1990) (specifically adopting the Ninth Circuit's notice requirements in

[1] The Ninth Circuit has reaffirmed its reading of the notice required by Fed. R. Crim. P. 32(a) ("Rule 32") and 18 U.S.C. §3553(d)(1988). United States v. Ramirez Acosta, 895 F.2d 597 (9th Cir. 1990); United States v. Hedberg, No. 89-30114 slip op. (9th Cir. May 9, 1990)(LEXIS Genfed, U.S. App. 7392).

Nuno-Para); United States v. Williams, No.88-2528 slip op. (7th Cir. May 4, 1990)(to be reported at 901 F.2d 1394)(LEXIS Genfed, U.S. App. 7215) (citing approvingly to the notice requirements of Nuno-Para); See United States v. Hernandez, 896 F.2d 642 (1st Cir. 1990) (not directly deciding the issue of notice but acknowledging the holdings of Nuno-Para and other cases).

2. Respondent's attempt to exclude the Fifth and Second Circuits from the conflict is not persuasive. The court below itself recognized that it was rejecting the proposition that any notice was needed before sentence was imposed and expressly noted its disagreement with these circuits on this point. (Pet. App. A at 6). The Second Circuit is flatly in conflict with the decision below. United States v. Palta, 880 F.2d 636, 640 (2d Cir. 1989) ("[a]dequate notice and an opportunity to contest an upward departure from the guidelines are indispensable to sentencing uniformity and fairness").

Respondent's claim that there is no conflict with the Fifth Circuit is based on a conclusion that the Fifth Circuit does not require notice if the departure is based on facts contained in the presentence report. (Brief in Opposition at 5, 8). Petitioner would agree only that the Fifth Circuit cases are not entirely clear on this point. See United States v. Otero, 868 F.2d 1412, 1415 (5th Cir. 1989) and United States v. Michael, 894 F.2d 1457 (5th Cir. 1990). Regardless, reliance by the respondent and court below on the conclusion that notice is not

required if the factual basis for the departure can be gleaned from the presentence report, (Pet. App. A at 6),[2] does not weaken the depth of the conflict presented here. This type of distinction is itself the focus of a clear conflict among the circuits. Nuno-Para, 877 F.2d at 1415 ("[the notice] requirement is not satisfied by the fact that the relevant information is present within the presentence report. Rather, such information either must be identified as a basis for departure in the presentence report, or, the court must advise the defendant that it is considering departure based on a particular factor and allow defense counsel an opportunity for comment") (footnote and citations omitted); Anders, 899 F.2d at 570 ("[t]he presentence report or the court must inform the defendant of factors that may constitute grounds for departure from the Guidelines. This requirement is not satisfied, however, by merely including the relevant information in the presentence report. Instead 'such information either must be identified as a basis for departure in the presentence report, or, the court must advise the defendant that it is considering departure based on a particular factor and allow defense counsel an opportunity to comment'")(quoting Nuno-Para, 877 F.2d at 1415)(emphasis in original)(citations omitted).

The opinions cited reflect the judicial view that adequate notice of departure from the Sentencing Guidelines is a matter of

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[2] Whether petitioner had any notice from the presentence report that his conduct disrupted a governmental function is a very questionable proposition. See (Pet. at 13-14).

fundamental fairness. Contrary to the respondent's contention, (Brief in Opposition at 6 n. 2), neither the Due Process Clause, Rule 32, nor the Guidelines themselves are satisfied when only a presentence report is available to the defendant that does not at least highlight any factor as possible grounds for departure.[3] See Nuno-Para, 877 F.2d at 1415 (acknowledging due process implications of notice question while deciding on basis of Rule 32 alone); Anders, 899 F.2d at 575-76 (same).

Both the respondent's position and the opinion below ignore the fairness and accuracy requirements of the Sentencing Guidelines and Rule 32. While the court below acknowledged that "the defendant could have made a stronger argument for himself had he known that the judge was intending to depart from the Guidelines and the reasons for such departure . . . ," it went on to say that it did not see "any language in Rule 32 or the Guidelines requiring the judge to tell the defendant he should make the best case." (Pet. App. A at 6). However, "[a]dequate notice and the opportunity to contest an upward departure from the guidelines are indispensable to sentencing uniformity and fairness". Palta, 880 F.2d at 640. The court below recognized that presentencing notice provides the defendant some adversarial advantage by helping him to "make his best case," yet rejected the conclusion reached elsewhere that such notice serves

[3] See Pet. at 12-13 (discussing impairment of petitioner's ability to contest factual grounds for departure on appeal, due to lack of departure notice and resultant inability to get his version properly into record).

to help ensure "the sentencing process is accurate and fair." United States Sentencing Commission, Guidelines Manual ("U.S.S.G.") §6A1.3 commentary.

This petitioner could not have been aware of the factors used by the sentencing judge to opt for an upward departure from the Guidelines. The presentence report stated that no circumstance of Burns' crimes might warrant departure from Sentencing Guidelines, nor did the probation officer recommend any departure. (Pet. App. C at 13). The government and defendant had entered into a plea agreement which contemplated a sentence within the Guideline range. (Pet. App. C at 15). Thus, nothing could have put the defendant or his attorney on notice that the judge was considering certain factors as a basis for an upward departure.[4]

Respondent's position on this question requires defense counsel to attempt to second-guess a sentencing judge's thought process by arguing against every possible interpretation of the facts which might yield an upward departure. Not only is this possibility grossly inefficient, it puts counsel in the position of suggesting to the court fresh interpretations which might be harmful to the defendant's position. This would violate the defense lawyer's duty to his client, and effectively shift part

[4] The judge apparently had concerns some time before the hearing began, since the sentencing hearing was adjourned at 3:40 P.M. on October 14, 1988, (T.R. Sentencing at 32) and the five page typewritten memorandum order was filed with the clerk that same day, indicating that the written memorandum had probably already been prepared. Yet, at no time until sentence was passed did the judge reveal her concerns.

of the government's burden to the opposing party. Such an approach cannot promote fairness and accuracy in the sentencing process, which are at the heart of the Sentencing Guidelines. Therefore, the Court should review this question and reverse the decision below.

3. However this case is viewed, there is a conflict between the circuits which if allowed to persist will undermine the underlying rationale for the Sentencing Guidelines - the desire for consistency and fairness in the federal sentencing procedure. It is evident from the increasing number of cases and the rapidly expanding number of circuits involved, that the requisite notice attendant to a sentencing upward departure is an important and recurring matter. Even if this Court concludes that Rule 32 and 18 U.S.C. §3553(d) only entitle a defendant to notice immediately prior to imposition of sentence, that is more than is required by the District of Columbia Circuit. Fairness in the context of what process is due in a federal sentencing procedure must be the same in the District of Columbia, Los Angeles and Chicago. Because of the conflict that currently exists between circuits, this can only be accomplished by this Court granting certiorari in the case below and making clear whether and when a defendant has a right to notice and an opportunity to respond when there is an upward departure from the federal Sentencing Guidelines.

4. Respondent seeks to avert review by this Court by perfunctorily claiming that the petitioner waived his right to appeal the district court's failure to give notice of its upward departure. (Brief in Opposition at 7). This waiver claim is unwarranted.

First, even assuming that there was a waiver of the notice claim, it became irrelevant when the court below decided the issue on the merits with no discussion of waiver. (Pet. App. A at 1-7). The court wrote a precedent setting opinion which established a notice rule in the District of Columbia Circuit which is now in direct opposition to decisions in at least three circuits (Second, Sixth and Ninth) and seemingly inconsistent with three others (First, Fifth and Seventh). By creating a substantial conflict on an issue of both constitutional and statutory significance in the federal system, the court below rendered moot any claim that the court was not obliged to address the issue on the merits.[5]

Moreover the notice issue was preserved for review. Respondent mistakenly relies on United States v. Velasquez, 868 F.2d 714 (5th Cir. 1989), as its sole support for the waiver

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[5] Even if the court below found that a waiver had occurred, it could have reviewed the merits of petitioner's sentence by concluding "that denying review will violate a defendant's substantial rights." United States v. Justice, 877 F.2d 664, 670 (8th Cir.) reh'g and reh'g en banc denied (8th Cir. Aug. 7, 1989). See also United States v. White, No. 89-1598 slip op. at 27-28 (7th Cir. May 24, 1990) (discussing "plain error" doctrine in sentencing appeal). Alternately, in one circuit's view the court can review waived sentencing issues "because they involve matters of law under a novel and potentially complex scheme . . . ." United States v. Taylor, 868 F.2d 125, 126 (5th Cir. 1989).

argument. (Brief in Opposition at 7). Velasquez claimed on appeal that he was not given adequate opportunity to dispute the presentence report during his sentencing hearing. Id. at 715. The Fifth Circuit held that the claim was waived because each of the lawyers representing Velasquez was given an opportunity to be heard and one was even asked whether "he had anything more to say." Id. With no indication that counsel was cut off in any way and in the absence of an objection, the court refused to consider the procedural issue. Id. If Velasquez stands for anything it is simply that one cannot claim denial of a fair opportunity to be heard when the court expressly asked for comments and received them.

The Velasquez type of affirmative express waiver of a right to be heard is irrelevant here. The petitioner did not become aware of any grounds for objection until sentence was imposed. (Pet. App. C at 27-32). The district court gave no advance warning of the grounds for departure, nor did she invite discussion of departure after sentence was imposed.[6] No Court of

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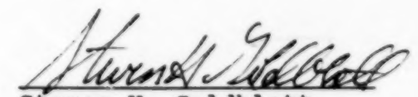
[6] Other circuits have recognized the rule that a requirement to object is only present if the sentencing judge affirmatively provides an opportunity for objections during the hearing. E.g., United States v. Jones, 899 F.2d 1097, 1102-03 (11th Cir. 1990) (because "new causes for objection, which the parties could not reasonably have anticipated, may arise during the hearing or during the imposition of sentence[,] . . . [whenever] the district court has not elicited fully articulated objections following the imposition of sentence, [the Court of Appeals] will vacate the sentence and remand"); Williams, No. 88-2528 slip op. at 19 ("[b]oth before and after imposing sentence, the district judge gave defense counsel opportunities to object. . . . This procedure complied with the requirements of Rule 32 and §6A1.3"); See also United States v. Lemire, 720 F.2d 1327, 1352 n. 37 (D.C. Cir. 1983) (finding waiver where

Appeals ruling on adequacy of departure notice, including the court below, has held an objection necessary to preserve this type of notice issue. Moreover, because a lack of notice is not apparent until the sentencing judge actually imposes an upwardly departing sentence, the issue is fairly subsumed within the scope of review under 18 U.S.C. §3742(a)(1988), which provides a statutory right to appeal the validity of departure without the need for an objection in the trial court.

CONCLUSION

Based on the foregoing reasons, as well as the reasons stated in the Petition for Certiorari, the petitioner respectfully requests that this Court grant the Petition for a Writ of Certiorari and review the decision of the District of Columbia Circuit in this case.

Respectfully submitted,



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defendant clearly knew restitution would be part of sentence to be imposed, yet failed to object during hearing).

No. 89-7260

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

WILLIAM J. BURNS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY MEMORANDUM

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that one copy of the foregoing Reply Memorandum for Petitioner was mailed, postage pre-paid, to: John G. Roberts, Jr., Acting Solicitor General of the United States, Tenth and Constitution Avenue, Washington, D.C. 20530, on this 20th day of June 1990.

Steven H. Goldblatt

STEVEN H. GOLDBLATT
Counsel for Petitioner

(6)

No. 89-7260

In The

Supreme Court of the United States

October Term, 1990

WILLIAM J. BURNS

Petitioner,

v.

UNITED STATES

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed April 19, 1990
Certiorari Granted June 28, 1990

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93 pp

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Document
07.12.88	Complaint filed, arrest warrant executed
08.10.88	Information filed
08.11.88	Case assigned to Judge Norma Holloway Johnson. William Burns arraigned, waives indictment, and pleads guilty to counts 1, 2, and 3 of the information. Waiver of jury trial approved and plea agreement filed.
10.14.88	Sentencing – Counts 1, 2, and 3: (60) months each count to run concurrent with each other; three years supervised release, special assessment $150.00, One hundred (100) hours of community service per year during supervised release. Defendant committed.
10.14.88	Receipt and acknowledgement of Presentence Investigation Report filed.
10.14.88	Order filed directing United States Marshal's Service to comply with requirements with respect to property transfers, liquidations, and sales set forth in restitution agreements.
10.14.88	Memorandum order concerning departure from Sentencing Guidelines filed.
10.24.88	Notice of appeal filed from sentence imposed 10-14-88 and from Memorandum Order filed 10-14-88 concerning departure from Sentencing Guidelines.
11.29.88	District Court grants Burns' application for leave to appeal in forma pauperis.
01.12.90	Decision and order of the United States Court of Appeals affirming the judgment of the District Court.

03.15.90 Burns' petition for rehearing and suggestion for rehearing *en banc* denied.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	Crim.
	)	No. 88-0302
v.	)	
	)	
WILLIAM J. BURNS	)	

Filed August 10, 1988

INFORMATION

The United States of America charges:

Count I

From on or about February 25, 1982, through on or about May 26, 1988, in the District of Columbia and elsewhere, the defendant WILLIAM J. BURNS did knowingly and willfully embezzle, steal, and purloin funds of the United States in the amount of $1,215,110.45.

All in violation of Title 18, United States Code, Section 641.

Count II

On or about June 29, 1988, in the District of Columbia and elsewhere, the defendant WILLIAM J. BURNS did present for payment to the United States Department of the Treasury two claims against the United States, to wit: two Voucher and Schedule of Payments Form 1166's calling for payments on behalf of the United States Agency for International Development to Vincent Kauffman in the amounts of $23,804.21 and $22,270.46, when the

defendant WILLIAM J. BURNS knew said claims for payment to be false, fictitious, and fraudulent in that no money was due and owing from the United States Agency for International Development to Vincent Kauffman.

All in violation of Title 18, United States Code, Section 287.

Count III

From on or about February 25, 1982, through on or about May 26, 1988, in the District of Columbia and elsewhere, the defendant WILLIAM J. BURNS did willfully attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for calendar years 1982, 1983, 1984, 1985, 1986, and 1987 by maintaining a bank account in the fictitious name of Vincent Kauffman for the purpose of concealing additional unreported taxable income received by the defendant WILLIAM J. BURNS during said calendar years, on which said unreported taxable income, as he then and there well knew and believed, there was due and owing to the United States of America an income tax of $475,685.00.

All in violation of Title 26, United States Code, Section 7201.

Respectfully submitted,

/s/ James M. Cole

/s/ Michael K. Fee

Trial Attorneys
Public Integrity Section
Criminal Division
U.S. Department of Justice

[U.S. Department Of Justice Letterhead Omitted]

CR 88-302

AUG 11 1988

David R. Addis, Esq.
Dickstein, Shapiro & Morin
2101 L Street, N.W.
Washington, D.C. 20037

Albert H. Turkus, Esq.
Dow, Lohnes & Albertson
Suite 500
1255 Twenty-Third Street, N.W.
Washington, D.C. 20037

Dear Messrs. Levine and Turkus:

Re: *United States v. William J. Burns* No. 88-0520M/ Misc. No. 88-226/Cr. No. 88-0302

I write to set out the terms of the agreement reached between the United States of America, William J. Burns, and Kathy Burns concerning the above referenced matters. The agreement is as follows:

1. Mr. Burns agrees to waive indictment and plead guilty to one count of theft of government funds (18 U.S.C. §641), one count of false claims against the United States (18 U.S.C. §287), and one count of tax evasion (26 U.S.C. §7201) as set out in the information attached as Exhibit A to this agreement. It is understood by all parties to this agreement that this plea will be covered by the Sentencing Guidelines. Based on each party's calculations it is assumed that a sentencing range of Level 19, Criminal History Category I, will apply to this case. If calculations by the United States Probation Office or the Court produces a different

sentencing range, either party may withdraw from this agreement and any property transfers done pursuant to this agreement will be null and void. No agreement exists as to what sentence Mr. Burns will receive within that sentencing range or what recommendation the United States will make at the time of sentencing. The United States will not oppose a continuation of Mr. Burns' present bond until the time of his surrender to the penal institution designated by the Bureau of Prisons.

2. Mr. Burns agrees to submit to full debriefings, under oath, and to provide truthful statements as to any and all criminal activity in which he has been involved or has knowledge, and agrees to cooperate fully with the United States in any investigations and prosecutions which may result from these debriefings.

3. Mr. Burns and his wife, Kathy Burns, agree to submit to full debriefings, under oath, and to provide truthful statements concerning the nature, location, method of acquisition and other details of any and all of their joint and individual financial holdings, including but not limited to real property, personal property, stocks, bonds, securities, safe deposit boxes, foreign bank accounts, foreign investments, domestic bank accounts, and domestic investments.

4. Any and all real property, personal property, money, stocks, bonds, securities, and other things of value owned by Mr. or Mrs. Burns will be conveyed and surrendered to the United States. Any and all property or things of value transferred in any way by Mr. or Mrs. Burns to persons, other than bona fide purchasers for value, will be

recovered by Mr. or Mrs. Burns and conveyed and surrendered to the United States. The only exceptions to this are the following items to be retained by Mrs. Burns:

a. Property and funds which Mrs. Burns can establish were not acquired with any funds provided by Mr. Burns nor derived in any way from Mr. Burns;

b. One automobile and funds in the amount of $10,000, to the extent Mrs. Burns' funds and property referenced in sub-paragraph (a), apart from necessary household and certain personal items, do not amount to this figure; and

c. Necessary household items, one wedding and engagement ring set, and the wedding gifts listed on Exhibit B to this agreement.

5. Mr. Burns will execute an agreement with the United States, which is not dischargeable in bankruptcy, wherein if he acquires funds over a specified value he will agree to pay to the United States the difference between the liquidated value of the property conveyed and surrendered to the United States under paragraph 4 above and the total amount the United States has lost as a result of his criminal acts throughout the period of his government employment.

6 The United States will not prosecute Mr. Burns for any other criminal activity related to this matter. All charges currently pending and not incorporated in this agreement will be dismissed by the United States after Mr. Burns' plea has been accepted by the Court.

7. Any statements made by Mr. or Mr. Burns pursuant to this agreement will not be used against the person making the statement in any subsequent criminal proceeding other than perjury, making a false statement, or enforcement of this agreement. This grant of use immunity is understood by all parties to be only as extensive as the immunity provided for in 18 U.S.C. 6001 *et seq.*, except that the United States is free to use information derived from such statements against the person making the statements.

8. The United States will bring no criminal charges against Mrs. Burns in relation to this matter.

9. Nothing in this agreement affects or is intended to affect any civil tax liability of Mr. and/or Mrs. Burns.

10. If it is determined by the United States that Mr. or Mrs. Burns has knowingly given false, incomplete, or misleading testimony or information, or has failed in any way to fulfill completely each and every one of their respective obligations under this agreement, they will be in violation of this agreement and the United States will be released from its commitment to honor any and all of its obligations under this agreement. Mr. and Mrs. Burns understand and explicitly agree that if they fail to fulfill any of their respective obligations under this agreement, including the giving of truthful information, the United States would be free, where appropriate in its discretion, to prosecute either or both of them for perjury, false statements, and/or obstruction of justice, to move to vacate Mr. Burns' guilty plea, and to nullify this agreement in its entirety.

11. No promises, representations, or inducements have been made to Mr. and Mrs. Burns other than what is contained in this letter. Any changes to this agreement must be made in writing and signed by all parties.

If this agreement comports with the understanding of all parties please signify so by having all parties sign it below.

Sincerely,

/s/ James M. Cole
Counsel for the United States

/s/ Michael K. Fee
Counsel for the United States

We have consulted with our attorneys and fully understand all of our rights in relation to this matter. We have read the foregoing agreement between the United States of America and William J. Burns and Kathy Burns and have carefully reviewed every part of it with our attorneys. We understand all of the terms and agree to them.

8-11-88
DATE — /s/ WILLIAM J. BURNS

8-11-88
DATE — /s/ KATHY BURNS

We are the attorneys for William J. Burns and Kathy Burns. We have fully explained their respective rights to them in relation to this matter. We have carefully reviewed every part of this plea agreement with Mr. and Mrs. Burns. To our knowledge, their decision to enter into this agreement is an informed and voluntary one.

8/11/88
DATE

/s/ DAVID R. ADDIS
Counsel for William J. Burns

8/11/88
DATE

/s/ ALBERT H. TURKUS
Counsel for Kathy Burns

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States of America	)	
vs.	)	Docket No. 88-0302-01
BURNS, William J.	)	

PRESENTENCE REPORT

Prepared for:	The Honorable Norma H. Johnson United States District Judge
Prepared by:	Ralph Ardito, Jr. United States Probation Officer Telephone: 535-3181
Sentencing date:	October 11, 1988 at 9:45 a.m.
Offense:	*Count 1*: 18 U.S.C. 641, Theft of Government Funds, a class C felony *Count 2*: 18 U.S.C. 287, False Claims Against the Government, a class D felony *Count 3*: 26 U.S.C. 7201, Tax Evasion, a class D felony
Release status:	Arrested on July 12, 1988; released on July 18, 1988, on a $500,000 property bond and has remained in the community since that time.
Identifying Data	
Date of Birth:	February 19, 1940
Social Security Number:	578-54-8762
Address:	3048 Brownstone Court Burtonsville, Maryland 20866
Detainers:	None
Codefendants:	None

[Handwritten entry]

10/14/88: 60 months confinement, 3 yrs. supervised release.

100 hrs. community service per year in lieu of fine.
Court recommends FCI Allenwood.

Assistant U.S. Attorney	*Defense Counsel*
James Cole	David Addis (Retained)
Public Integrity Section	c/o Dickstein, Shapiro & Morin
Department of Justice	2101 L Street, N.W.
1400 New York Avenue, N.W.	Washington, D.C. 20037
Washington, D.C. 20005	Telephone: 785-9700
Telephone: 786-5056	

Date Report Prepared: September 20, 1988
Date Revised:

PART A. THE OFFENSE

Charge(s) and Conviction(s)

1. On August 10, 1988, William J. Burns was named in a three count Information charging him with Theft of Government Property, in violation of Title 18, U.S. Code, Section 641 (Count 1); False Claims Against the Government, in violation of Title 18, U.S. Code, Section 287 (Count 2); and Tax Evasion, in violation of Title 26, U.S. Code, Section 7201 (Count 3). On August 11, 1988, the defendant appeared before the Honorable Norma Holloway Johnson, at which time he entered a plea of guilty to the three count Information. At the time of plea, a sentencing date was scheduled for October 11, 1988, at 9:45 a.m.

2. Since the offense took place after November 1, 1987, the Sentencing Reform Act of 1984 is applicable.

Related Cases

3. None.

The Offense Conduct

4. In December of 1987, the Agency for International Development conducted a routine background check

on the defendant as he maintained a security clearance with that agency. The investigation determined that the defendant was living in a Burtonsville, Maryland home valued in excess of $400,000, which raised suspicions as the defendant's income was $35,108. As a result, a credit check was done, where the agency discovered numerous bank accounts in the defendant's name. An analysis of the bank records revealed numerous checks authorized by the Agency for International Development originally payable to Vincent Kaufman, subsequently deposited into Mr. Burns' account. It was later proven by way of handwriting analysis that Vincent Kaufman was, in fact, William Burns.

5. The internal investigation determined the following scheme, which resulted in the theft of Government funds by the defendant. Mr. Burns, as supervisor of the Financial Management Section, with authority to approve travel vouchers, would issue a false claim (Form 1034) in the name of Vincent Kaufman. Vincent Kaufman allegedly was a contractor who would move furniture for the Agency for International Development. The false form was prepared by a clerk and subsequently approved by the defendant. The voucher would then be sent to the U.S. Treasury Department for payment to Vincent Kaufman. The payment checks were then sent directly to the account of Vincent Kaufman for deposit and subsequently removed by the defendant. The Government has determined that 53 fraudulent checks were issued and the total amount of the theft was $1,261,184.92.

6. Mr. Burns fully admitted that he committed this offense, stating that he was in financial difficulty at the time it occurred. Also, he was being divorced from his first wife and at least initially, the stolen funds were used to pay his required child support payments. Subsequently, the money was used to impress his girlfriend, Kathy Martini, whom he later

married. He said that not only did he deceive his wife and family, but ultimately, himself.

7. Between February 25, 1982 and May 26, 1988, the defendant embezzled from the Agency for International Development $1,261,184.92, which monies he failed to report to the Internal Revenue Service for calendar years 1982, 1983, 1984, 1985, 1986, and 1987. As a result of his failure to report this income, he has an outstanding tax obligation of $475,685.

Adjustment for Obstruction of Justice

8. The Probation Officer has no information to suggest that Mr. Burns impeded or obstructed justice in this case.

Adjustment for Acceptance of Responsibility

9. Mr. Burns has fully accepted responsibility for the theft of approximately $1.2 million. He has fully cooperated with the Government in identifying the properties and monies that were recoverable and he has agreed to transfer any and all assets to the Government.

Offense Level Computation

10. Counts 1 and 2 of the Information represent related offense conduct and each count is treated as a single group. Section 3D1.2(1).

11. Because Count 3 of the Information represents an unrelated offense, this count will be treated as a separate group. Section 3D1.3(a).

Counts 1 and 2 – Theft of Government Funds and False Claims Against the Government

12. Base Offense Level: The guideline for 18 U.S.C. 641 and 18 U.S.C. 287 is found in Section 2B1.1(b)(1) and 2F1.1 of the Guidelines. Those sections provide that Theft of Government Funds and False Claims Against the Government in the amount of $1,215,110.45 have a base offense level of 17.

13. Specific Offense Characteristics: The defendant was a public servant who violated a trust and used a special skill in a manner to significantly facilitate the commission of the offense. Based on Section 3B1.3, the offense level is increased two levels.

14. Victim Related Adjustment: None

15. Adjustment for Obstruction of Justice: None

16. Adjusted Offense Level (subtotal):

Count 3 – Tax Evasion

17. Base Offense Level: The guideline for 26 U.S.C. 7201 is found in Section 2T1.1 (a) of the Guidelnes (sic). That section provides that Tax Evasion has a base offense level of 14.

18. Specific Offense Characteristics: As the defendant failed to report income exceeding $10,000, an increase of 2 levels is appropriate (Section 2T1.1(b)(1)(A)).

19. Adjustment for Role in the Offense: None

20. Victim Related Adjustment: None

21. Adjustment for Obstruction of Justice: None

22. Adjusted Offense Level (subtotal):

Multiple Count Adjustment (see Chapter 3, Part D).

		Units
Counts 1 and 2: Adjusted Offense Level	19	
Count 3: Adjusted Offense Level	16	
Total Units		2
Greater of the Adjusted Offense Levels	19	
Increase in Offense Level	2	
Combined Adjusted Offense Level	21	

23. Adjustment for Acceptance of Responsibility: The defendant fully accepted his responsibility in Counts 1, 2 and 3 of the Information. Based on Section

3E1.1(a), the combined adjusted offense level is reduced two levels.

24. Total Offense Level:

PART B. THE DEFENDANT'S CRIMINAL HISTORY

Juvenile Adjudications.

25. None.

Criminal Convictions.

26. None.

Other Criminal Conduct

27. None.

PART C. SENTENCING OPTIONS

Custody

28. Statutory Provisions: The maximum term of imprisonment for Count 1 is ten years.

29. Statutory Provisions: The maximum term of imprisonment for Count 2 is five years.

30. Statutory Provisions: The maximum term of imprisonment for Count 3 is five years.

31. Guideline Provisions: Based on a total offense level of 19, and a criminal history category of I, the guideline imprisonment range is 30 to 37 months.

Supervised Release

32. Statutory Provisions: A term of not more than three years may be imposed in Count 1 (18 U.S.C. 3583(b)(2)).

33. Statutory Provisions: A term of not more than three years may be imposed in Counts 2 (18 U.S.C. 3583(b)(2)).

34. Statutory Provisions: A term of not more than three years may be imposed in Count 3 (18 U.S.C. 3583(b)(2)).

35. Guideline Provisions: A term of at least two years, but not more than three years in Count 1 (Section 5D3.2(b)(2)).

36. Guideline Provisions: A term of at least two years, but not more than three years in Count 2 (Section 5D3.2(b)(2)).

37. Guideline Provisions: A term of at least two years, but not more than three years in Count 3 (Section 5D3.2(b)(2)).

Probation

38. Statutory Provisions: The defendant is not eligible for probation (18 U.S.C. 3561(a)(1)).

39. Guideline Provisions: The defendant is not eligible for probation according to Section 5C2.1(f).

PART D. OFFENDER CHARACTERISTICS

Family Ties, Family Responsibilities and Community Ties

40. The defendant was born to the legal union of Edward and Margaret (nee: Ellis) Burns in New York, New York on February 19, 1940. The defendant's father was employed as a Government worker and his mother was a housewife. He described his upbringing as normal, with no unusual problems. The defendant has three older siblings, Edward Burns who is employed as a certified public accountant; Margaret Burns Hughes who is employed as a secretary; and Nora Burns Hanrahan who works as a trainer for the C&P Telephone Company. All three siblings remain close with the defendant and reside in the metropolitan Washington, D.C. area. The defendant is the only sibling to have been involved in the criminal justice system.

Mr. Burns' father died at the age of 78 and his mother died, also at the age of 78.

41. The defendant was initially married to Barbara (nee: Robeson) Burns on February 8, 1962 in Bethesda, Maryland. As a result of the marriage, three children (Susan, age 19; Deborah, age 18; and Jacqueline, age 15) were born. The couple remained together until each sought a voluntary separation based on irreconcilable differences. On November 9, 1982, a decree of divorce was granted in the Circuit Court for Montgomery County (Equity No. 76296). The settlement agreement decreed that the defendant's wife would have custody of the three daughters and Mr. Burns was obligated to pay $210 per month for each child until his daughters reached the age of 18. The defendant was granted visitation rights. Mr. Burns agreed to transfer to his first wife his interest in their residence for the sum of $15,000. The defendant explained that he continues to maintain an excellent relationship with his three children and he has met the Court-ordered child support requirements. He characterized his current relationship with his former wife as poor.

42. The defendant married his current wife, Cathy (nee: Martini) Burns, age 32, on October 26, 1985, in Lanham, Maryland. As a result of this union, twin boys (William, Jr. and Robert Edward), age 23 months, were born. Mr. and Mrs. Burns appeared to have a very caring and supportive marriage and they remain committed to each other during this difficult time. It was obvious that both individuals were under a great deal of stress, the result of Mr. Burns' pending incarceration.

Mental and Emotional Health

43. There is no indication to suggest that Mr. Burns has suffered from any psychological or psychiatric impairment. The defendant was able to articulate his motivation for his involvement in the instant offense and he had excellent recall.

Physical Condition, Including Drug Dependence and Alcohol Abuse

44. The defendant stands 5'8" tall and weighs approximately 170 pounds. He characterized his physical health as excellent.

45. The defendant explained that he has never used any narcotic or mind-altering drugs. He remarked that he drinks alcohol occasionally and on a social basis.

Education and Vocational Skills

46. Mr. Burns graduated from Coolidge High School in June of 1958, in Washington, D.C. He attended Montgomery College in Takoma Park, Maryland from 1958 to 1961, majoring in business administration.

Employment Record

47. From 1967 until July 1988, Mr. Burns was employed with the United States Agency for International Development, located at 522 22nd Street, N.W., Washington, D.C. On July 29, 1988, and as a result of his arrest, he was suspended by that agency without pay. At the time of the suspension, he was employed as a supervisor for the Financial Management Section as a GS-11/step 9, earning $35,108 per year.

48. His former supervisor, Mr. Kyle Schooler, said that in his opinion, the defendant was hard-working, reliable and trustworthy. Further, Mr. Burns' integrity was never questioned during the two year period Mr. Schooler supervised the defendant.

49. Prior to this employment, he was also employed by the United States Postal Service and the Department of Labor for approximately four years.

PART E. FINES AND RESTITUTION

Statutory Provisions

50. *Count 1*: The maximum fine is $250,000 (18 U.S.C. 3571(b)(1)(A)).

51. *Count 2*: The maximum fine is $250,000 (18 U.S.C. 3571(b)(1)(A)).

52. *Count 3*: The maximum fine is $250,000 (18 U.S.C. 3571(b)(1)(A)).

53. A special assessment of $50 on each count (total: $150) is mandatory (18 U.S.C. 3013).

54. According to the Public Integrity Section, Department of Justice, the United States Government is the victim in this case. Specifically, the defendant illegally stole $1,261,184.92. Per the plea agreement, the defendant is to transfer all monies and title to properties to the United States Government. It is estimated that the United States will receive between $600,000 and $700,000 in monies and properties when the transfer is completed. Thus, the loss to the Government is $561,184.92. In the event that there is Court-ordered restitution, it should be payable to the U.S. Treasury.

Guideline Provisions

55. The fine guideline range for this offense is from $6,000 to $250,000.

Defendant's Ability to Pay

Assets	
Cash (wife, per plea agreement)	$ 10,000
Unencumbered Assets	
Vehicle (Ford Aerostar Van (wife))	16,000
Encumbered Assets	None
TOTAL ASSETS	26,000

Liabilities

Secured Debts	None
Unsecured Debts	
Legal Fees (defendant)	35,000
Legal Fees (wife)	15,000
Federal tax obligation (before penalties and interest)	475,685
Connecticut Avenue Caterers	1,500
Credit cards (total)	8,977
TOTAL DEBT	536,162
NET WORTH	- 510,162

Monthly Cash Flow

Income	None
Necessary Living Expenses	
Mortgage	695
Food	800
Medical expenses	130
Water	55
Gas	55
Electric	196
Telephone	40
Life Insurance (no cash value)	100
Credit cards	207
Child support payment	210
TOTAL	2,488
NET MONTHLY CASH FLOW	- 2,488

56. It appears from the defendant's financial statement that he is unable to pay a fine, the cost of incarceration or supervised release.

PART F. FACTORS THAT MAY WARRANT DEPARTURE

57. There are no factors that would warrant departure from the guideline sentence.

PART G. IMPACT OF THE PLEA AGREEMENT

58. The defendant entered pleas of guilty to all counts of the Information in which he was charged. Therefore, the plea agreement did not impact on the possible sentence that could be imposed.

Respectfully submitted,

EUGENE WESLEY, JR.
CHIEF U.S. PROBATION OFFICER

/s/ By: Ralph Ardito, Jr.
U.S. Probation Officer

RARDITOjr:nlc

Reviewed and Approved:

/s/ Arthur Carrington
Supervising U.S. Probation Officer

ADDENDUM TO THE PRESENTENCE REPORT

The Probation Officer certifies that the presentence report, including any revision thereof, has been disclosed to the defendant, his attorney, and counsel for the Government.

OBJECTIONS

By the Government

The Assistant U.S. Attorney has reviewed the presentence report but has filed no objections within the prescribed ten-day period.

By the Defendant

The defendant, and his counsel, have reviewed the presentence report, but have filed no objections within the prescribed ten-day perod (sic).

CERTIFIED BY

EUGENE WESLEY, JR.
CHIEF U.S. PROBATION OFFICER

/s/ By: Ralph Ardito, Jr.
U.S. Probation Officer

Reviewed and Approved:

/s/ Arthur Carrington
Supervising U.S. Probation Officer

Date: _____

EXPLANATION OF THE PRESENTENCE REPORT

This explanation is intended to acquaint the bench and bar with the format of the presentence report and to inform all parties about the purpose of each section and how the information reported is related to the Sentencing Reform Act and the Guidelines issued under it by the United State Sentencing Commission.

PART A. THE OFFENSE

Charge(s) and Conviction(s)

This section reports the charge against the defendant and the present status of the charge. The statute violated, the title of the offense, and the date of the offense are presented. If there are codefendants, the status of each codefendant is described.

Related Cases

Any separate cases arising out of the instant offense are referenced.

The Offense Conduct

This section describes the offense conduct that is relevant to the determination of the offense level under Chapter 2 of the Guidelines. It also describes the role the defendant played in carrying out the offense, which may result in an adjustment to the offense level pursuant to Chapter 3, Part B of the Guidelines. This section identifies any victim of the offense and any harm the victim suffered, which may result in an adjustment under Chapter 3, Part A, and may also be relevant in determining if restitution is required. It includes information indicating whether the offense of conviction was part of a

scheme or plan that included other criminal conduct, and information which may be relevant to the defendant's state of mind or motive in committing the offense. Such information may be relevant to the determination of the appropriate guideline, the selection of a sentence within the guideline range, and the decision to depart from the Guidelines.

Adjustment for Obstruction of Justice

This section contains information that is relevant to determining whether the defendant obstructed justice during the investigation or prosecution of the offense of conviction. Under Chapter 3, Part C of the Guidelines, an adjustment to the offense level is to be made if obstruction of justice occurred. In addition to the information reported here, the Judge may consider any obstruction of justice committed by the defendant in the presence of the Court.

Adjustment for Acceptance of Responsibility

This section contains information that is relevant to determining whether an adjustment of the offense level is warranted based on the defendant's acceptance of responsibility for the offense of conviction. This adjustment is authorized by Chapter 3, Part E of the Guidelines.

Offense Level Computation

This section presents the calculation of the total offense level. For each count, it identifies the applicable guideline and shows the base offense level, any specific offense characteristics that modify the base offense level, and any adjustments that affect the offense level. In cases involving multiple counts, the groups of closely related counts are displayed. The number of

units for each count or group of closely related counts is identified and the combined adjusted offense level for the entire case is computed. (See Chapter 3, Part D of the Guidelines).

If the defendant is a career criminal or committed the instant offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income as defined in Chapter 4, Part B of the Guidelines, the defendant's total offense level may be increased. Any such increase is set forth in this section, following the total offense level computation, and is based on information appearing later in this report.

PART B. THE DEFENDANT'S CRIMINAL HISTORY

This part contains the record of the defendant's criminal history and the calculation of the defendant's criminal history category under the Guidelines. Section 4A1.1(a) through (e) of the Guidelines establish numerical values for prior convictions as follows:

(a) 3 POINTS for each prior adult sentence of imprisonment exceeding one (1) year and one (1) month that was imposed within fifteen (15) years of the defendant's commencement of the instant offense or that resulted in the defendant's incarceration during any part of that fifteen-year period. (See Sections 4A1.1(a) and 4A1.2).

(b) 2 POINTS for each prior adult or juvenile sentence of imprisonment of at least sixty (60) days not counted under paragraph (a) above, if the prior sentence was imposed within ten (10) years of the commencement of the instant offense. However, for an offense committed before age 18, the sentence will only be counted if the defendant

was released from confinement within five (5) years of the commencement of the instant offense. (See Sections 4A1.1(b) and 4A1.2).

(c) 1 POINT for each prior adult or juvenile sentence not counted under paragraphs (a) or (b) above, if the prior sentence was imposed –

(1) within ten (10) years of the commencement of the instant offense if the defendant was 18 or over at the time the prior offense was committed; or

(2) within five (5) years of the commencement of the instant offense if the defendant was under 18 at the time the prior offense was committed. (See Sections 4A1.1(c) and 4A1.2).-

(d) 2 POINTS if the defendant committed the instant offense while under any criminal sentence (for example, while in prison; or on work release, parole, supervised release, or probation, or while in escape status). (See Sections 4A1.1(d) and 4A1.2).

(e) 2 POINTS if the defendant committed the instant offense less than two (2) years after release from imprisonment on a sentence counted under paragraphs (a) or (b) above. However, only one (1) point is added if two (2) points were added under paragraph (d) above. (See Sections 4A1.1(e) and 4A1.2).

See Section 4A1.2 of the Guidelines for definitions and instructions for calculating the criminal history category, including a list of convictions that are not counted.

Juvenile Adjudications/Criminal Convictions

This section contains a report of the defendant's record of juvenile adjudications of guilty or delinquency, criminal convictions, and diversionary dispositions based on a finding or admission of guilt. Adjudications and convictions are included in chronological order, whether or not they are used is calculating the criminal history category under the Guidelines; the value assigned to each sentence under Section 4A1.3 of the Guidelines is shown. Convictions not used in the calculation may be considered by the sentencing Judge in deciding whether to depart from the guideline range. In addition, the entire record of convictions may be relevant in selecting a sentence within the applicable guideline range and in determining conditions of probation or supervised release.

Criminal History Computation

This Section contains the calculations of the criminal history category under the Guidelines. It is based entirely on the criminal record reported in the previous section. If the defendant is a career criminal as defined in Chapter 4, Part B of the Guidelines, the defendant's total offense level may increase and the defendant's criminal history category shall be VI (the highest criminal history category provided in the Guidelines).

Other Criminal Conduct

This section reports on prior unadjudicated criminal conduct that may have made the defendant's commission of the offense of conviction more serious and therefore deserving of greater punishment, and/or may indicate a propensity to engage in criminal conduct and therefore a

need to incapacitate the defendant. Such conduct may be relevant in determining whether the offense of conviction was part of a pattern of criminal conduct from which the offender derived a substantial portion of his income. See Section 4B1.3 of the Guidelines. Section 4A1.3 of the Guidelines suggests that such conduct may also be considered by the sentencing Judge as a ground for departing from the Guidelines. The conduct reported in this section may also be relevant in determining conditions of pobation (sic) or supervised release.

Pending Charges

This section lists any pending charges against the defendant. This section is omitted if there are no pending charges.

PART C. SENTENCING OPTIONS

This part sets forth the penalties authorized by statute and the kinds of sentences available under the Guidelines. Included are (1) the range of possible prison terms set forth in the sentencing table in Chapter 5, Part A of the Guidelines; (2) possible sentences not involving imprisonment; and (3) options for post—release supervision if a term of imprisonment is imposed. The statutory provisions and the guideline provisions for each, including custody, probation, and supervised release, are presented for reference and comparison.

Relevant policy statements of the United States Sentencing Commission are set forth. Fines and restitutions are not discussed in this part; they are treated in Part E of the report.

PART D. OFFENDER CHARACTERISTICS

This part contains information that may be relevant in determining the appropriate term, if any, and conditions of probation or supervised release. It may also be relevant to the defendant's ability to make restitution or pay a fine, discussed more fully in Part E. The information set forth in this part is generally not to be used in determining whether a defendant is to be incarcerated or for how long. (See 28 U.S.C. 944(e); Guidelines, Chapter 5, Part H). However, some of the information may be relevant in determining whether to depart from the Guidelines.

PART E. FINES AND RESTITUTION

This part sets forth the statutory provisions governing fines, special assessments, and restitution. It also contains the guideline recommendations with regard to fines and contains an assessment of the defendant's ability to make restitution or pay a fine. If the defendant is unable to pay a fine, Section 5E4.2(f) of the Guidelines requires the Court to consider alternative sanctions such as community service. In some cases, statutes require forfeiture of certain of the defendant's assets. These provisions are not addressed in the presentence report except insofar as forfeiture may reduce the assets available for fines and restitution.

PART F. FACTORS THAT MAY WARRANT DEPARTURE

This part contains the Probation Officer's statement of "any factors that may indicate that-a sentence of a different kind or of a different length from one within the applicable guideline would be more appropriate under all the circumstances." Fed.R.Crim.P. 32(c)(2)(B). Such

factors include those set forth in Chapter 5, Part K of the Guidelines. Inclusion of a factor in this part does not constitute a recommendation by the Probation Officer that a departure be made.

PART G. IMPACT OF THE PLEA AGREEMENT

This part is included in presentence reports that are prepared when a plea agreement has been tendered to the Court. In it, the Probation Officer assesses the impact of the plea agreement on the guideline sentence by comparing the guidelines applicable under the plea agreement with the guidelines that would apply if the defendant were to plead to all counts. The analysis is based on the assumption that the allegations of the counts to be dismissed could be proven, and that additional relevant factors in the investigative files are correct.

ADDENDUM TO THE PRESENTENCE REPORT

In some Courts the presentence report is disclosed to the defendant, counsel for the defendant, and counsel for the Government before it is submitted to the Judge. This procedure allows both counsel to communicate with the Probation Officer to resolve any concerns or objections regarding material information, sentencing classifications, or the sentencing guideline range contained in the presentence report. Early disclosure of the report to the attorneys allows the Probation Officer to conduct any further investigation and make revisions to the presentence report that may be necessary. Any unresolved issues or objections are reported to the sentencing Judge in an addendum to the presentence report. The addendum also contains the Probation Officer's comments regarding the issues.

[Caption Omitted In Printing]

RECEIPT AND ACKNOWLEDGEMENT OF PRESENTENCE INVESTIGATION REPORT

Filed Oct. 14, 1988

This is to acknowledge that each of the undersigned has received, read, understand, and fully discussed with each other, the Presentence Investigation Report and worksheet computations regarding Guideline Sentencing in the above-entitled case. The undersigned further acknowledge that:

(CHECK APPROPRIATE BOX)

(X) there are no material factual inaccuracies therein

( ) there are material factual inaccuracies in the PSI report and/or worksheet computations and those are set forth in the attached Memorandum. The location (paragraph and page) of the alleged inaccuracies should be specified. In the event that these material inaccuracies are not resolved by the Probation Officer or the other parties, the Probation Officer shall request the Court to permit testimony at the sentencing hearing regarding these material inaccuracies and request the Court, for scheduling purposes, to set aside time for consideration of ___ number of exhibits and ___ number of witnesses to be heard.

/s/ William J. Burns
9/28/88
(Date)

/s/ David R. Addis
9/26/88
(Date)

This is to acknowledge that I have received, read, and understand the Presentence Investigation Report and worksheet computations regarding Guideline Sentencing in the above-entitled case. The undersigned further acknowledges that:

(✓) there are no material factual inaccuracies in the Report.

( ) there are material inaccuracies in the PSI Report and/or worksheet computations and those are set forth in the attached Memorandum. The location (paragraph and page) of the alleged inaccuracies should be specified. In the event that these material inaccuracies are not resolved by the Probation Officer or the other parties, the undersigned shall request the Court to permit testimony at the sentencing hearing regarding these material inaccuracies and request the Court, for scheduling purposes, to set aside time for consideration of ___ number of exhibits and ___ number of witnesses to be heard.

/s/ Michael K. Fee USDOJ
9/23/88
Date

NOTICE OF OBLIGATION OF THOSE EXECUTING THIS FORM

It is the Court's request that those executing this form who claim material inaccuracies or dispute any portion of the PSI Report or guideline computations shall first submit the case in writing to the Probation Officer and, thereafter, arrange for a conference with him/her to the end that any disputes may be resolved prior to the sentencing hearing. It is also understood that counsel for the government and the defense may be requested to have a joint conference with the Probation Officer in a further effort to resolve any disputes prior to the sentencing hearing and submission of the PSI and accompanying worksheets to the sentencing Judge.

FOR THE COURT

By: Eugene Wesley, Jr.,
Chief Probation Officer
U.S. District Court, D.C.

STATEMENT OF CLAIMED INACCURACIES THAT ARE MATERIAL TO SENTENCING

[Third Page Blank And Not Included In Joint Appendix]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted In Printing]

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE NORMA HOLLOWAY JOHNSON, UNITED STATES DISTRICT JUDGE
October 14, 1988

[2] PROCEEDINGS

THE DEPUTY CLERK: United States of America versus William J. Burns, Criminal No. 88-302.

Mr. Cole and Mr. Fee are here for the government. Mr. Eisenstat and Mr. Addis are here for the defendant, who is present, and Mr. Ardito is here for the probation office.

THE COURT: All right, Mr. Burns, if you will come forward, please, with your counsel.

MR. ADDIS: Good afternoon, Your Honor.

THE COURT: Good afternoon.

You are Mr. William J. Burns?

THE DEFENDANT: I am, Your Honor.

THE COURT: Mr. Burns, you will perhaps recall that you appeared before me on August 11, 1988, and entered pleas of guilty to three counts of an information. I accepted your pleas of guilty, continued the matter for sentencing with the request that the probation department prepare an investigation and a report to me.

I have received that report from the probation department and I have been advised by the probation officer, Mr. Ardito, that it has been presented to you and your attorney and to government counsel, that both sides have had an opportunity to review it and have acknowledge receipt of it through this document.

I note that you and Mr. Addis have stated that there [3] are no material factual inaccuracies within the report that has been provided to me by the probation department.

Is this indeed your signature?

THE DEFENDANT: It is, Your Honor.

THE COURT: And your acknowledgment?

THE DEFENDANT: Yes.

THE COURT: And, Mr. Addis, I'm sure this is your signature.

MR. ADDIS: It is, Your Honor. There is one ambiguity, however, in the report which I have previously discussed with Mr. Ardito and I would just like to invite the court's attention to if I could.

THE COURT: I will do that as soon as I find out from Mr. Fee if indeed this is his acknowledgment that the United States has read the report and there are no material factual inaccuracies in the report.

MR. FEE: That's correct, Your Honor.

THE COURT: Very well. Now we can talk about ambiguities.

MR. ADDIS: Your Honor, the only ambiguity, and I think it may have some impact here, is under the listing of assets which Mr. Burns has, it lists, I believe, about $16,000 worth of assets, but then after the listing of the assets, there is the parenthetical notation that these are the wife's assets. So that while the heading of that portion of the report is [4] "Defendant's assets" and it then lists $16,000, it also makes clear that those $16,000 worth of assets are not his but are in fact his wife's, and that's the issue I wanted to bring to Your Honor's attention, that in fact those assets are the sole and distinct property of his wife and not of Mr. Burns.

THE COURT: Thank you very much. I thought actually it was – well, it was very clear to me upon reading the report, because it says, "cash (wife, per plea agreement)" and I remembered that, and I also remembered the van.

MR. ADDIS: Yes.

THE COURT: And I also noted that Mr. Ardito did enough for me to know what he was talking about.

MR. ADDIS: Right.

THE COURT: But I think it's good for the record to have that clarified to the extent that you have done.

MR. ADDIS: Thank you.

THE COURT: Since both sides, Mr. Burns, have acknowledged receipt of the presentence report and have had an opportunity to be heard on any material factual inaccuracies, ambiguities and otherwise, I am now prepared to proceed to sentencing in this case.

Before proceeding to sentencing, however, I would like to advise both Mr. Cole and Mr. Addis that I have had an opportunity now to review the substance of the matters which you presented to me shortly before this hearing.

[5] Am I to understand that these are just copies that I have, because if – these are not the originals. I don't have Mrs. Burns' signature on here.

MR. COLE: That's correct, Your Honor. I have for the court at this time an original order form that is unsigned with attachments, which are copies or – originals, actually, of the agreements executed by all the parties and would hereby submit them to the court.

THE COURT: Is Mr. Turkus here today?

MR. COLE: He is not here today, Your Honor. However, I was – if it would help, I was present last night with him at the time he signed those documents.

THE COURT: All right.

MR. ADDIS: And I have spoken with him subsequently about that, Your Honor and he has signed those documents.

THE COURT: All right. Thank you very much.

Well, Counsel, as I indicated to you earlier this afternoon, I would be willing to sign these later today if I had had an opportunity to read the entire package. I have read the proposed order. I have read the substantive agreements, but I have not read the attachments, and it will only be after I have read everything that I would be willing to place my signature hereon.

MR. COLE: Absolutely, Your Honor. We have no objection to that and, of course, should you have any questions, [6] feel free to pose them to me and/or Mr. Addis.

THE COURT: Fine. As far as the substance is concerned, with the exception of "notarized" being misspelled, everything else seemed to be okay.

MR. COLE: My apologies, Your Honor.

THE COURT: No problem.

Then, Mr. Burns, we are now ready to proceed to sentencing. I shall first ask Mr. Addis to speak in your behalf. After I hear from him, I will then hear from Mr. Cole on behalf of the United States. Then you will be given an opportunity, Mr. Burns, to say anything at all that you wish to say with respect to the offenses for which you entered a plea of guilty or with respect to the sentence or anything else that you think you would like me to know since I shall be imposing sentence on you before you leave here today.

I would also like you to know, Mr. Burns, that in addition to the presentence report, I received letters, and I have read them all with care, from your daughter Deborah; from a sister, Mrs. Margaret Hughes; from your wife, Kathy Burns; from your father-in-law, Mr. Robert Martini; from a friend, Lieutenant Commander Deitz – I think that's the correct pronunciation – from a close friend, Mr. Marks; and from a sister, Mrs. Hanrahan. All of those matters have been presented to me and I have had an opportunity to review them.

I will be happy now to hear from you, Mr. Addis.

[7] MR. ADDIS: Thank you, Your Honor.

Your Honor, as Mr. Burns is before you, so are his family, his friends, his loved ones. Present in the courtroom today are his wife, Kathy Burns, three of his five children, including two sons who are approximately two years of age, and who I think right now are right outside the courtroom –

THE COURT: I saw them leave.

MR. ADDIS: Yes, Your Honor.

– His parents-in-law, a number of friends, his brother and his two sisters, many of the same people who have written you and several people who have not but who are here to show their support for someone that they have come to know and they have come to love. They have come to love this man. They have come to rely upon him as a friend, a husband, a father.

I'm not saying this to deprecate the seriousness of what he stands here having pled guilty to, because everybody acknowledges, particularly Mr. Burns, that it is a very serious offense.

Recently we have embarked, we the judicial system, on an attempt to try and codify how individuals should be punished. We who are familiar with the criminal justice system refer to them as the guidelines.

An exhaustive effort has been made by the government, by counsel for Mr. Burns, by the probation office, by the court to look at this offense in terms of the guidelines. It is a [8] serious offense. It is an offense he takes and has always taken full responsibility for, and the

guidelines measure his position in the government, his responsibility, the length of time that this offense occurred, the amount of money that was taken, the sophistication, all those aggravating factors that make this a serious offense, and they come out with a score. And there is a mitigating factor that is also included in here, and that is his acceptance of responsibility, and that then leads us to a new score and to a guideline range for a period of incarceration, and the guideline for this offense, as I recollect, is between 31 and 37 months.

Now, that's not my conclusion and it's not the probation office's. It is the guideline that has been reached after deliberation by the best panel that the courts, the congress could put together.

Now, Mr. Burns, as reflected in the probation report, got some credit for his acceptance of responsibility, for saying, "yes, I did it." But he has gone far, far beyond that. He has submitted and his wife has submitted to sworn depositions, hours of depositions by the government as to how this offense took place, as to how methods could be constructed so that this type of thing could never happen again, as to where his assets were. He has produced long before that evidence of assets the government never had and probably never would have had but for his telling them of that. The government's records, [9] Your Honor, only go back to 1982. Beyond that, they don't have records. He has freely acknowledged to the government that which they could never prove, that in fact he started this in 1980, and he told them how much, and not only did he tell them how much he took, and we're talking about things far beyond the statute of limitations and amounts they could never

prove, he has obligated himself to repay that, and this is not a hollow obligation.

As Your Honor now knows, this man has been stripped of every single thing he owns, except his clothes and his toilet articles. Whatever pension he had accrued in 27 years with the government, gone. Whatever funds he had put in his I.R.A., they are gone. Articles he inherited from his deceased parents, they are gone. Everything he has purchased, whether he purchased it before 1980, after 1980, whether he purchased it with money that he earned at any point in time, whether he had it in virtue of an inheritance, because he did have some assets as a result of an inheritance, that's all gone. He has not one bit of real or personal property other than his clothes and his toilet articles.

He has signed an agreement which Your Honor has now seen which obligates him to a repayment schedule, one that's consistent with the government's interests and one that's consistent with his responsibilities, because he is the father of five children, one of whom is in college now, two of whom, as [10] Your Honor have seen, are just barely toddlers, and that family unit he must continue to provide for at a time when he's released, and he's aware of that obligation, and yet everything that he had set aside to take care of them, no matter how it was earned, is now gone, everything. Gifts he received from family members, gone. Everything signed over to the government now to be sold as part of his effort at restitution.

The obligation he has is never dischargeable except through payment, and he has obligated himself to that,

and that is completely aside from whatever tax obligations he has, because this agreement doesn't deal with that and he will have to resolve that with the internal revenue service.

And, Your Honor, that has not been taken into consideration in the guidelines because it isn't there beyond acceptance of responsibility, and we believe that when a man comes forward, albeit after having committed a serious offense – there's no denying that – and says, "yes, I did it and now I will go further. I will tell you things you could not have known. I will produce for you assets you would never have known about, and I will see that you have them all now and in the future," we believe that that is worthy of consideration, too, Your Honor. It does not undo what was done. But it does evidence the first steps towards coming back as part of society, and that's what this is all about, because he is going to have to do that.

[11] He is the sole support of his two children. His wife has not worked since the children were born. Before that time, she never – though she did work, she never earned enough to support what is now a small family. Yesterday she moved in with her parents. Her father is retired. She will now rely on her parents for child support while she tries to find work, enough to make their expenses. Her husband will be gone for some time.

And that some time, Your Honor, is why we are here, because soon, at some point, he will resume his place in society, and we don't know what place that will be. He does have one or two job offers. They are not for a lot of money, but they would enable him to resume the support

of his family and maybe with a little time resume making payments on his obligation.

But, Your Honor, if he is separated from his family for too long, then maybe that becomes much more difficult, because these children are only two years of age. He's only been married to his wife for a few short years, and he has to look to what he's going to come back to and rebuild and there has to be something there to rebuild.

Your Honor has many obligations at sentencing time. There is punishment. There's deterrence. There's also tailoring it to the individual. This is not a man who has a criminal record before this time. This is not a man whom I believe the court would consider to be a danger in the future. [12] That's not the way of these kinds of cases.

So Your Honor has to balance the punishment and the deterrence with what is to be done with this man.

Last night, Your Honor, several of the local news stations carried long stories about the federal authorities showing up to literally divest him of everything he owns. There's a lot of deterrence there. He has given up far more than he could have been made to in any lawsuit. That's his obligation. He understands that. He recognizes it. He's entered into it voluntarily.

As the government well knows, there wasn't 10 minutes of discussion whether this case would ever go to trial. This case was to be resolved immediately. Mr. Burns walked right into the probation officer and told him everything, sat down with Mr. Fee and Mr. Cole and a series of investigators and a court reporter and for hours went over every nuance, not only what he did but how

accounting controls could be strengthened in the future in the area in which he worked.

He has done everything he could since his arrest to try and make amends for what he's done. Is it enough? I suspect Your Honor will say No and that a period of incarceration is necessary. We only ask, Your Honor, that that period of incarceration be limited enough that he has a family to return to, that he has a future that he can work towards rebuilding, and we think the guidelines are the appropriate range, Your Honor. We ask Your Honor to consider a sentence within the guidelines. Thank you.

THE COURT: Thank you very much, Mr. Addis.

Mr. Cole, I'll be happy to hear from you now.

MR. COLE: Thank you, Your Honor.

Indeed, when we come to a sentencing hearing, it is a serious matter because it sends a lot of signals throughout the community, throughout the nation. In a case like this which has had much publicity, there are things to be gained from that.

In Mr. Burns' favor as he comes before you today, Your Honor, there are some things. There are his acknowledgment of his guilt in this matter. There is his agreement to make restitution, and I would represent to the court that to the best of our knowledge, by and large Mr. Burns has indeed complied with his plea agreement as far as the things that he was required to do.

But on the other side of the ledger is what can only be termed an outrageous crime. The nature of the funds which Mr. Burns has taken should be considered. A.I.D. is an agency which provides foreign assistance from our

country's treasury. It provides food, medical attention, agricultural attention, industrial help, economic help to countries throughout the world to help feed people, clothe people. This is achieved through money. By taking the money that Mr. Burns took, he prevented or reduced the ability of A.I.D. to fulfill these laudatory and [14] humanitarian functions.

Now, it can be noted that the money that Mr. Burns took might have been from a leftover travel fund here or there, but these unused funds which he did take would have gone into the coffers of A.I.D., could have gone into many other areas to do good work. This is something which should be considered on the side of harm, which should be considered as to the level of punishment that's appropriate.

Much can be said about the laxness with which A.I.D. had treated some of this money and its accounting procedures on the money, creating perhaps a target of opportunity for Mr. Burns. But what must be remembered is that Mr. Burns was put in the position of trust at A.I.D. to protect the public's money in these kinds of endeavors and he was charged with making sure it went where it was supposed to go. He was the control.

Mr. Burns was not a master criminal. He was a person who was given some trust. He was asked to protect money and he abused that trust in an extreme fashion.

It is always sad whenever a person who is in a public office abuses the trust that they are given in that office. There are undoubtedly others in other governments agencies who are in a similar situation as Mr. Burns had occupied at A.I.D. and this sentence that you give today,

Your Honor, must send a message of deterrence to those people.

We are then left with the enormity of Mr. Burns' crime. [15] As reflected in the agreement which Your Honor has before you, the full amount is one million 370-some odd thousand dollars that he has taken. If this is not the largest, it is certainly one of the largest single thefts of public funds committed in the history of the american criminal law, and what is striking about it, Your Honor, is the attitude which Mr. Burns had towards this money. It is clear that this money was not stolen out of a need. It was stolen out of pure greed. He had the attitude that the United States Treasury was his personal bank account. Anything he wanted, he bought, and any luxury which he felt that he wanted to lavish upon himself and his family, in whatever quantity or quality, he would thus lavish.

As an example, people buy video games today. They go to a toy store, they buy the games, but Mr. Burns would go and buy a commercial video game worth $2,500, at least, the kind that are found in bars.

Both Mr. and Mrs. Burns had their own vehicles. Yet Mr. Burns decided to go and buy himself a toy of a sports car in addition.

The year of 1985 when Mr. Burns built his house, he stole almost half a million dollars of government funds to pay for that house.

All of this is not to state to the court that the specific items are important but to show the attitude Mr. Burns had with this money, the attitude of, "I can spend whatever I [16] want because I have unlimited funds in the

Treasury of the United States due to my position of trust."

Maybe we do owe a debt of gratitude to Mr. Burns for having shown us that maybe we can't trust all of our financial officers and financial watchdogs and maybe we need more controls in our government, but until these controls are in place, your sentence must serve to deter the others who are in those positions, who are in the positions Mr. Burns was in and are able to, because of the lack of controls, breach that trust. Your sentence must show more is required of a person and will be exacted from a person than merely having to pay back what they have stolen.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Cole.

Mr. Burns, I will be happy to hear from you now, sir.

THE DEFENDANT: Your Honor, I want to apologize and tell everyone I'm sorry and I'm ashamed of what I did. I'm sorry for the hurt I've put to my family and myself and my five children. That's all.

THE COURT: Thank you, Mr. Burns.

Is there anything further from you, Mr. Addis?

MR. ADDIS: Just, Your Honor, to clarify. As Mr. Cole mentioned, these were travel funds which were not expended at A.I.D.

THE COURT: All right.

[17] Mr. Burns, I have been able, of course, to learn a lot about you since the date you appeared before me and entered your plea of guilty to one count of theft of government funds, a class C felony, one count of false claims against the government, a class D felony, and one count of tax evasion, also a class D felony.

The court has learned about your background, your family, your children. I have learned about your employment history, the fact that you were married about just three years ago to your present wife and that you have twin sons not quite two years old.

I have learned that there has never been any indication or suggestion that you have suffered from any type of psychological or psychiatric impairment.

I have learned that your physical condition is good and that there has been absolutely no reason to believe that you have ever been drug dependent or abused alcohol.

I have learned that you are a graduate of a local high school and attended Montgomery College in nearby Maryland and that you have been employed by the United States Agency for International Development for 21 years.

Mr. Burns, I have given serious consideration to the appropriate sentence in this case. I have listened with great care to Mr. Addis and to Mr. Cole.

I agree with Mr. Addis that you have indeed made an [18] effort to return that which you stole that you may still have in your possession.

I understand from this agreement that you have executed today that you are turning over your home that you had built with all of its refinements, vehicles, whatever monies you have, including the money in your retirement account, in an effort to make restitution of that which you stole.

Of course, the statute of limitations is only a five-year period, but it is interesting today that you have admitted that you have been stealing from the Agency for International Development for fully eight years

I, of course, was presented on the date of your plea a statement which I think tracked the checks from 1982 through 1988.

MR. COLE: That's correct, Your Honor.

THE COURT: And I reviewed that schedule very carefully. I reviewed it very carefully and it told me some things. In fact, it told me a lot of things. The statement that I received told me that during the year 1982 you made five separate withdrawals from the account. In 1983 there were four. In 1984 there were 10. In 1985 there were 18. In 1986, nine. In 1987, eight, and in 1988, that is, until May 26th of '88, there were six.

I would dare say that perhaps you should be commended for trying to repay the United States. Many times when people [19] think of the United States, they think of a government which doesn't have the same qualities as human beings, faces, personalities and what have you, but I wonder if it has ever occurred to you that the United States from whom you stole so much money is actually the people who are here in the courtroom in

support of you today. They are all the citizens of the United States. That's who you stole from. You may have thought about it as some faceless government, but you were stealing from the taxpayers of the United States.

Every penny that you stole meant that the taxpayers had to pay it, because the Government has to go on, and even though this may have been the type of money that you felt was going to some foreign governments and therefore unworthy, that's not your judgment to make, and even though it was money that you felt because someone had not used it for travel, therefore no one would miss it, I can assure you, your fellow citizens had to pay.

So you didn't steal from some faceless government. You stole from your fellow citizens, because we have had to put that money back. We put that money there in the first place and we have had to put that money back that you have stolen.

I want you to keep that in mind. You weren't stealing from some faceless person. You were stealing from every citizen of the United States, and it never seemed to bother you.

Mr. Burns, it may be true that you are trying to make [20] restitution and that you choose to pay back all that you stole, but the truth of the matter is if there had not been an investigation, there is no reason for me to believe that it would have stopped in May of '88. It stopped in May of '88 because of an investigation.

You, an employee for over 20 years, not only were you apparently trusted by your employers, but you had

taken an oath to perform your job and only your job. You violated that oath. You violated every bit of trust that anyone had put in you.

And, yes, I know you have experienced self-punishment. Most people who commit crimes do experience self-punishment, but that is not what sentencing is for. Sentencing is not designed to see if you have punished yourself but to exact that which the state believes is an appropriate sanction for your criminal conduct. That's what sentencing is for.

The guidelines which apply to this case do indeed reflect that the appropriate sentence is within the range of 30 to 37 months. Or is it 31 to 37?

MR. ADDIS: I believe it's 31 to 37, Your Honor.

THE COURT: All right, 31 to 37 months. But I have considered this matter and I believe, Mr. Burns, that the appropriate sentence can only be effected if the court departs from the guidelines. Under the appropriate circumstances, the court may depart from the sentence imposed by the guidelines. Title 18, section 3553(B) of the United States Code authorizes a [21] departure from the sentencing guidelines when the court finds that there exists an aggravating or a mitigating circumstance of a kind or to a degree not adequately taken into consideration by the sentencing commission in formulating the guidelines.

In its policy statement, the U.S. Sentencing Commission states that, "the presence of factors not adequately considered in the guidelines may, in the discretion of the sentencing judge, warrant departure from the guidelines.

Moreover, the court may depart from the guidelines even though the reason for departure is listed elsewhere in the guidelines if the court determines that in light of unusual circumstances the guideline level attached to that factor is inadequate."

Further, the Commission stated that, and I quote, "the controlling decision as to whether and to what extent departure is warranted can only be made by the court at the time of sentencing."

Thus, the guidelines expressly authorize the sentencing judge to consider circumstances at sentencing that may justify departure from the established guidelines.

I find at least three factors that I believe are involved in your offenses which I feel the guidelines either fail to address or to consider adequately.

First, I find that the guidelines, in considering the severity of the offenses, do not sufficiently weigh the duration of your criminal conduct. You have plead guilty to and thus [22] confessed to theft from the United States Government for at least six years, from February 25, 1982, to May 26, 1988. I admit that I recognize that the statute of limitations is only five years, all right.

Throughout the course of these years you caused over 53 different fraudulent checks to be issued by the United States Government.

While the guidelines permit me to consider the level of planning involved in the offense and the amount of money stolen, I cannot ignore the number of years and the amount of fraudulent transactions planned, schemed and executed by you, and I do not believe that they were

considered by the guidelines or, if so, adequately considered.

I find it significant that you persisted for over five years in perpetrating this criminal activity against the taxpayers of the United States. The failure of the sentencing guidelines to account for this, I believe, is a ground for departure from the guidelines.

Moreover, while the guidelines do take into consideration the fact that you violated the public trust in committing these crimes, the court finds that there was more involved in your acts of theft and false claims than a mere violation of public duty. You abused a process relied upon by the government to pay those who perform important and legitimate services for the United States. In taking advantage of this [23] vital system of remuneration over such a lengthy period of time, you have disrupted the functions of the government in addition to violating the public trust.

As I earlier indicated, you also totally violated your oath of employment by your devious conduct over many years. A million three could have been stolen at one time, but if a million three had been stolen at one time from A.I.D., it would have been recognized. You, in your devious manner, stole at a rate that made it difficult for it to have been easily ascertained.

The sentencing guidelines permit departure when "the defendant's conduct resulted in a significant disruption of a governmental function, and the court may increase the sentence above the authorized guideline range."

The court finds that you caused significant governmental disruption by stealing government funds in excess of one million dollars and by way of 53 separate fraudulent instruments.

Finally, the guidelines permit the court to depart from the prescribed sentence if the defendant committed the offense in order to facilitate or conceal the commission of another offense.

In this case, I refer to count three in which you failed to report the stolen income for calender years 1982 through 1987, resulting in a tax obligation of almost half a [24] million dollars. By continually evading the payment of your taxes, you were also able to conceal crimes of theft and false claims. Certainly, if you had not concealed this, your crimes would have been discovered much earlier.

For these reasons, I find that several important elements of the crimes committed by you are not adequately considered by the sentencing guidelines, thus warranting a departure from its prescription.

This being the case, the court relies upon its own judgment and experience and finds that the guideline range for the offenses which you committed must be departed from.

Pursuant to the Sentencing Reform Act of 1984, Mr. Burns, it is the judgment of this court that you shall be committed to the custody of the Bureau of Prisons for a term of 60 months. Upon release from imprisonment, you shall be placed on supervised release for a period of three

years. The conditions of supervised release will include the following:

That you abide by the standard conditions of supervised release recommended by the Sentencing Commission, that you do not commit another federal, state or local crime, that you pay a special assessment to the United States of 50 dollars on each of the three counts of the information for a total of 150 dollars, that you provide to the probation officer access to any requested financial information, and that you contribute 200 hours of community service – I'm sorry – that you contribute [25] 100 hours of community service per year upon your release from confinement.

The court finds that restitution has been achieved through the plea – is it called a plea? It's not called a plea agreement.

MR. COLE: We have referred to it in the other agreements, Your Honor, as a plea agreement.

THE COURT: All right. It's a restitution agreement.

MR. COLE: Subsequent agreements would just be an agreement.

THE COURT: All right. The agreement of restitution. So the court will therefore not order any special restitution.

The court does find that based upon this agreement that you have entered into with the government this date that you will perhaps not have the ability to pay a fine of any type after your release, and for that reason the court does not order you to pay a fine. And I would also say that based upon the agreement that I read today that you

will not have the ability to pay the cost of incarceration, and for that reason the court will not order you to pay for incarceration. Because, however, you cannot pay a fine and cannot pay the cost of incarceration, therefore, the court is ordering you to contribute these hours of community service per year in lieu of the fine payment, and it is so ordered.

Now, I would like you to know, Mr. Burns, that since I [26] have departed from the sentencing guidelines, you have an absolute right to appeal your sentence, and I am sure that Mr. Addis will advise you as I am going to advise you now that the appeal must be filed within 10 days of today's date. If you no longer have the funds to note an appeal or to retain counsel for your appeal, the court of appeals will permit you to file without prepayment of costs, and the court of appeals will appoint counsel to represent you if you are unable to retain counsel of your own.

The defendant will step back with the Marshal.

MR. ADDIS: Your Honor, may I be heard before the defendant goes?

THE COURT: Certainly.

MR. ADDIS: Your Honor, we would ask that Mr. Burns be permitted to surrender himself to a place of incarceration for the following reasons:

First of all, the government has agreed not to oppose such a request, but we have affirmative reasons for requesting that. One, we would ask the court ultimately to recommend to the Attorney General the camp at Allenwood for this reason:

Mrs. Burns, the mother of the two small children, has a grandmother who lives about 35 minutes from the camp at Allenwood. If Your Honor were to recommend the camp at Allenwood, then Mr. Burns would most likely be incarcerated there and Mrs. Burns could then visit him much easily, [27] particularly given the difficulty of visiting him with the two children. She could go up. She could stay with her grandmother and then the camp would not be far away. So we would ask that Your Honor recommend Allenwood.

We would further ask, Your Honor, that Mr. Burns be permitted to surrender himself for these reasons:

One, he has absolutely abided by every condition of his release so far, both reporting to pretrial services and being here when necessary.

Secondly, I am informed by the representatives of the Bureau of Prisons and the probation office that it will take somewhere between two and probably three weeks to designate an institution for Mr. Burns, which means that in that interim, if he is taken into custody now, he will just be in a local holding facility.

THE COURT: It won't be in D.C. jail, I don't believe.

MR. ADDIS: And that's exactly the problem, Your Honor, that it then becomes exceedingly difficult, one, to find a place to house him; two, to have a place where I can discuss with him the things that must be done in the next 10 days. And, therefore, we would ask, Your Honor, that he be permitted to surrender himself at the earliest date set by the Bureau of Prisons. If they can designate a place in three days, I mean, that would be fine. I'm told

that absent some admonition from Your Honor to make it more quickly that it tends to be running [28] about two to three weeks right now for them to designate an institution. But if we don't do that, we will just be adding one more body to a local problem for two to three weeks until they can take him to one of those institutions for the rest of his sentence, and I would ask, therefore, that he be permitted to surrender himself at that time.

THE COURT: Mr. Cole, I know you are not going to take any position with respect to surrender, but I wonder do you wish to take any position with respect to the recommendation of Allenwood.

MR. COLE: The government has no objection to that recommendation, Your Honor.

THE COURT: All right. Well, with respect to Allenwood, just let me say this. It might be an institution that they would suggest for him anyway.

By the way, let me make it clear, and I think I should make it clear on the record, he is still category I. I increased the – criminal history I. I increased the category from 19 to 24, all right. So, it is likely that he would be designated to an institution similar to Allenwood, and for that reason, Mr. Addis, I will gladly make that recommendation, but I'm sure you understand and I just want Mr. Burns to know that that is all, absolutely all that it is. I cannot tell the Bureau of Prisons where to house people. I haven't the slightest idea whether Allenwood is as crowded as D.C. jail. I [29] don't know anything about that at this time. But I will recommend it and I would dare say that if space is available, it is likely that they will

comply with the recommendation. But I have no authority and I just want you to understand that. Is that understood?

With respect to the other area, Mr. Addis, I quite agree with you that there are things you are going to have to discuss with your client, and I also agree with you that the likelihood of his being housed in the District of Columbia jail is nil. It may be reopened. I don't know. But I believe that a voluntary surrender is not the appropriate thing in this case, and what I will do is I will just ask the Marshal service to try to house him in one of their contract places in either Northern Virginia or Montgomery County, Maryland, pending his designation.

MR. ADDIS: Your Honor, I know the Marshals will do their best, but my experience with those types of situations is that frequently the prisoners get moved, they get moved with very little notice and certainly no notice to their counsel.

Your Honor, if it will help satisfy the court, I will take him personally to the institution that is designated. He has been in contact with me daily. Your Honor, we're talking about a period of two weeks so that he can say good-by (sic) to his children. There are still things that need to be done in terms of the transfer of assets. He doesn't have all his clothes even [30] out of the house yet. Because of the very long process in inventorying everything between Mr. Burns and the Government Representatives yesterday, a process that we thought would be finished yesterday hasn't even been completed, Your Honor.

Frankly, if he is incarcerated now, all it will mean is he will be shuffled from one institution to another, and

there may not even be room in any of the contract institutions. Those are being pressured now to take people either from Lorton or from the D.C. jail.

I have some experience in this recently in other cases and it is really, frankly, a terrible situation. I spent two days recently trying to find out where a client was because they're moving them just to try and find room. Whenever a little bit of space opens up, they'll just move people and they try and keep them close to where they need to be in terms of courts. He won't have that need. They will feel that, rightly so, they don't have to bring him back to court and that they can move him around.

Your Honor, we are only talking about a short period of time. If Your Honor would admonish the Bureau of Prisons to designate a place within 10 days, and if they haven't designated a place within 10 days, then we'll turn him over to the Marshals. But, Your Honor, he may have to consult with other counsel. He has to decide whether he's going to file an appeal. There are a lot of issues which are really going to be impinged [31] upon if Your Honor does that.

This man poses no flight danger. He's been here every single time he should have been. There's never been any problem with pretrial services. He's always stayed in touch with me. Many times the Marshals have made requests of him to sign a document or provide some information. At the time allotted, he appears for the appointment with the Marshals.

Your Honor, it would seriously impede our ability to pursue the things we have to pursue in the next 10 days. Your Honor has posed literally a novel issue and this may

be one of the very first appeals from a sentence outside the guidelines.

THE COURT: There have been many in this court.

MR. ADDIS: Maybe this will be the first to get to the Court of Appeals, Your Honor.

THE COURT: Maybe to the Court of Appeals, all right.

MR. ADDIS: This is a rather sophisticated issue to explain to my client. He has important decisions to make. He has to meet with his family and I would ask Your Honor to give the Bureau of Prisons 10 days or 11 days, just one day beyond the date he has to file his notice of appeal, to designate an institution, and if they haven't done it by that time, then let him report to the Marshals and they can hold him until an institution is designated. But I believe the Bureau of Prisons, if encouraged to do so by Your Honor, could even designate in 10 days.

[32] THE COURT: Well, just let me say, Mr. Addis, that Mrs. Burns and all of the children have my deepest sympathy, but my responsibility is just a bit different from their responsibility. I know they love Mr. Burns very much and I know they want very much to have him with them, but my responsibility is just quite different. It's not the same as their responsibility or even your responsibility, and I have given this great consideration. I appreciate your eloquence.

IT IS SO ORDERED.

(Proceedings Adjourned at 3:40 P.M.)

[Certificate Of Reporter Omitted In Printing]

UNITED STATES DISTRICT COURT

_____ District of Columbia

UNITED STATES OF AMERICA

V.

William J. Burns

(Name of Defendant)

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Case Number 88-302

Filed Oct 14 1988
JAMES F. DAVEY, Clerk

David Addis, Esq.
Defendant's Attorney

THE DEFENDANT:

[XX] pleaded guilty to count(s) 1-3.

[ ] was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
18 U.S.C. 641	Theft of Government Funds	1
18 U.S.C. 287	False Claims	2
26 U.S.C. 7201	Attempt to Evade Income Tax	3

(Offenses committed 2/25/82 to 5/26/88, 6/29/88, and 2/25/82 to 5/26/88, respectively)

The defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[ ] The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

[XX] It is ordered that the defendant shall pay to the United States a special assessment of $150.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:

578-54-8762

10/14/88
Date of Imposition of Sentence

Defendant's mailing address:

(incarcerated)

/s/ Norma Holloway Johnson
U.S. DISTRICT JUDGE
Name & Title Judicial Officer

Defendant's residence address:

(incarcerated)

10/14/88
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of sixty (60) months.

[XX] The Court makes the following recommendations to the Bureau of Prisons:

that the defendant be incarcerated at the federal institution at Allenwood, Pennsylvania.

[XX] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district,

a.m.
[ ] at ___ p.m. on ___.

[ ] as notified by the Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

[ ] before 2 p.m. on ___.

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on ___ to ___ at ___, with a certified copy of this Judgment.

_____
United States Marshal

By _____ _____
Deputy Marshal

Judgment – Page ___ of ___

Defendant: William J. Burns
Case Number: 88-302

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of ___

three (3) years

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

The defendant shall provide the U.S. Probation Office with financial information.

The defendant shall complete one hundred (100) hours of community service per year during supervised release.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate

with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

Defendant: William J. Burns
Case Number: 88-302

RESTITUTION, FORFEITURE, OR OTHER PROVISIONS OF THE JUDGMENT

The Court finds that the defendant is unable to pay a fine or the cost of incarceration.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATE OF AMERICA	:	Criminal No.
	:	88-0302
vs.	:	FILED
WILLIAM J. BURNS	:	OCT 14 1988

MEMORANDUM ORDER

Defendant William J. Burns entered a plea of guilty to the following offenses: theft of government property, in violation of Title 18, U.S. Code, section 641 (1982); false claims against the government in violation of Title 18, U.S.C. Code, section 287 (1982); and tax evasion in violation of Title 26, U.S. Code, section 7201 (1982).

The Sentencing Guidelines are applicable to this defendant. Pursuant to the Guidelines, defendant may be sentenced to a prison term of 30 to 37 months. Under the appropriate circumstances, however, the Court may depart from the sentence imposed by the Guidelines. Title 18, U.S.Code, section 3553(b) (1982), authorizes a departure from the Sentencing Guidelines when the Court finds that "there exists an aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines. . . . In its policy statement, the U.S. Sentencing Commission states that the presence of factors not adequately considered in the Guidelines may, in the discretion of the sentencing judge, warrant departure from the Guidelines. Moreover, the Court may depart from the Guidelines even though the reason for departure is listed elsewhere in the Guidelines if the

Court determines that in light of unusual circumstances, the Guideline level attached to that factor is inadequate. Further, the Commission stated that the "controlling decision as to whether and to what extent departure is warranted can only be made by the court at the time of sentencing." United States Sentencing Commission, Sentencing Guidelines, § 5K2.0. Thus, the Guidelines expressly authorize the sentencing judge to consider circumstances at sentencing that may justify departure form the established Guidelines.

The Court finds at least three factors involved in the defendant's offenses which the Guidelines either fail to address or to consider adequately. First, the Court finds that the Guidelines, in considering the severity of the offenses, do not sufficiently weigh the *duration* of defendant's criminal activity. The Court recognizes that the statute of limitations on the crimes committed by defendant is only five years, but defendant has confessed to theft from the United States Government for over six years, from February 25, 1982, to May 26, 1988. Throughout the course of these six years, defendant caused fifty-three different fraudulent checks to be issued by the United States Government. While the Guidelines permit the Court to consider the level of planning involved in the offense, and the amount of money stolen, the number of years and the amount of fraudulent transactions planned, schemed, and executed were not considered pursuant to the Guidelines. The Court finds it significant that the defendant persisted for over five years in perpetrating this criminal activity against the taxpayers of

the United States Government. The failure of the Sentencing Guidelines to account for this is a ground for departure.

Moreover, while the Guidelines do take into consideration the fact that defendant violated the public trust in committing these crimes, the Court finds that there was more involved in defendant's acts of theft and false claims than a mere violation of public duties. Defendant abused a process relied upon by the government to pay those who perform important and legitimate services for the United States. In taking fraudulent advantage of this vital system of remuneration over such a lengthy period of time, plaintiff has disrupted the functions of the government in addition to violating the public trust.

In addition to violating the public trust, defendant totally violated his oath of employment by engaging in this protracted, devious conduct. A million, three hundred thousand dollars, if stolen at one time, would have been much easier to detect than the same amount of money stolen over a lengthy period of time. In his particularly devious manner, defendant stole at a rate and in a manner which made detection very difficult.

The Sentencing Guidelines permit departure when the "defendant's conduct resulted in a significant disruption of a governmental function, [and] the court may increase the sentence above the authorized guideline range." *Id.* at § 5K2.7. The Court finds that defendant caused significant governmental disruption by stealing government funds in excess of one million dollars, over a six year period, and by way of fifty-three separate fraudulent instruments.

Finally, the Guidelines permit the Court to depart from the prescribed sentence if "the defendant committed the offense in order to facilitate or conceal the commission of another offense . . . " *Id.* at § 5K2.9. In this case, as stated in Count III, the defendant failed to report the stolen income for calendar years 1982-1987, resulting in a tax obligation of almost half a million dollars. By continually evading the payment of his tax liability, the defendant concealed the crimes of theft and false claims. Certainly, if this concealment had not taken place, defendant's crimes would have been discovered much earlier.

For these reasons, the Court finds that several important elements of the crimes committed by defendant are not considered fully by the Sentencing Guidelines, thus warranting departure from its prescription. This being the case, the Court relies upon its own judgment and experience and finds that the range of thirty to thirty-seven months for the offenses committed by defendant is insufficient and does not reflect the magnitude of defendant's criminal conduct. The Court, therefore, increases the offense level from nineteen to twenty-four which provides a sentencing range of fifty-one to sixty-three months. Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that defendant be committed to the custody of the Bureau of Prisons for a term of sixty months.

/s/ NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

DATED: October 14, 1988

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 16, 1989 Decided January 12, 1990

No. 88-3161

UNITED STATES OF AMERICA

v.

WILLIAM J. BURNS

Appeal from the United States District Court
for the District of Columbia

MIKVA, Circuit Judge: This case requires us to rule on the validity of the trial judge's decision to depart from the sentence range contemplated in the Federal Sentencing Guidelines. The defendant, William J. Burns, pled guilty to theft of government funds, making a false claim against the government, and income tax evasion, crimes for which he expected to receive a sentence of 30 to 37 months in prison pursuant to the applicable Guidelines range. Despite the agreement of the U.S. attorney to the 30-37 month range and the recommendation of Burns' probation officer that Burns receive a sentence within that range, the trial judge found three reasons for an upward departure and sentenced Burns to 60 months in prison. Burns appeals his sentence, contending that the trial judge relied on impermissible grounds in enhancing his

sentence and that the extent of departure was unreasonable. He also maintains that the Federal Rules of Criminal Procedure and the Guidelines require that he be given advance notice of the judge's intention to depart. Because we find that the trial judge relied on three legitimate grounds for her departure decision and that nothing in the law requires a trial judge to provide advance notice of her intention to depart from the Guidelines, we affirm. As we are troubled by the plea bargaining procedure used in this case, we suggest that future plea agreements explicitly address the possibility that the trial judge may depart from the Guidelines, even if such a departure is not recommended by the government or the probation officer.

I. BACKGROUND

Burns was employed by the United States Agency for International Development ("AID" or "the agency") from 1967 until 1988. Beginning in February 1982, he used his position as a supervisor in the agency's Financial Management Section to authorize the payment of unused travel funds from the U.S. Treasury to Vincent Kaufman. However, the payments to Kaufman were really a front for diverting government funds to Burns' own pocket. From 1982 to 1988, Burns authorized the issuance of 53 checks totaling in excess of $1,200,000. Burns' scheme was discovered after a routine security check revealed that he owned a $400,000 house despite his annual salary of $35,000. Prior to his arrest, but after the government became aware of his embezzlement activities, Burns authorized the issuance of two checks in the name of Vincent Kaufman; these checks formed the basis for the

government's case against Burns on charges of making false claims against the government.

After his arrest, Burns and the government entered into an agreement whereby Burns agreed to plead guilty to theft of government funds in violation of 18 U.S.C. § 641, making a false claim against the government in violation of 18 U.S.C. § 287, and evasion of income tax in violation of 26 U.S.C. § 7201. Burns agreed to surrender all of his assets, except for some minor personal property, and to pay restitution to the government by surrendering 50 percent of all his future annual income over $40,000 and 100 percent of all future annual income over $70,000. He also agreed to cooperate fully with the government in its investigation of the matter. Under the agreement, both parties understood that Burns' plea would be covered by the Sentencing Guidelines and that a sentencing level of 19, Criminal History Category I (30-37 months) would apply to his case.

The probation officer's presentence report also concluded that Burns' sentence would be within the 30-37 month range, and did not recommend that Burns be given a sentence in excess of that prescribed by the Guidelines. At the sentencing hearing, however, Judge Johnson concluded that in order to give Burns an appropriate sentence, the court had to depart from the Guidelines. She noted that according to 18 U.S.C. § 3553(b), the sentencing judge is entitled to depart from the Guidelines in light of aggravating or mitigating circumstances that were not adequately considered by the Sentencing Commission. The trial judge found three factors involved in Burns' case that were not adequately addressed by the Guidelines. First, she found that although the Guidelines

permit adjustment for the amount of money stolen and the level of planning, they do not give sufficient weight to the duration of the crime. Because the defendant's fraudulent scheme persisted for six years and involved 53 separate instances, the judge concluded that departure from the Guidelines was warranted.

Additionally, while the Guidelines do consider the defendant's violation of the public trust, the trial judge found that the defendant's systematic abuse of the government's process of paying legitimate vendors, in addition to violating the public trust, constituted a disruption of government functions. Since § 5K2.7 of the Guidelines permits departure when "the defendant's conduct resulted in the significant disruption of a governmental function," the trial court found this to be a second reason for imposing an enhanced sentence.

Finally, as the Guidelines also permit departure if "the defendant committed the offense in order to facilitate or conceal the commission of another offense," the trial judge concluded that Burns' evasion of over $400,000 in taxes allowed him to conceal his theft and false claims and accordingly justified an upward departure from the Guidelines.

II. ANALYSIS

A. *Standard of Review*

The Sentencing Guidelines provide that a trial judge can depart from the Guidelines based on aggravating or mitigating circumstances which were not adequately considered by the Sentencing Commission in formulating the

Guidelines. 18 U.S.C. § 3553(b). If a factor is one which the Commission has already considered, it must be "present to a degree substantially in excess of that which ordinarily is involved in the offense of conviction." Guidelines § 5K2.0, ¶2. Determining whether a certain factor is an appropriate ground for enhancement of a sentence involves a question of statutory interpretation. To the extent that this requires us to decide whether the Commission adequately considered that particular factor, we subject the court's determinations to plenary review. *United States v. Diaz-Villafane*, 874 F.2d 43, 49 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 177 (1989); *see also, United States v. Burke*, No. 88-3179, slip op. at 5 (D.C. Cir. Oct. 31, 1989). Once it has been established that a factor is a legally permissible basis for departure, we give broad deference to the district court's judgment as to the appropriateness of considering this factor, and we will uphold the departure so long as it is reasonable. 18 U.S.C. § 3742(e)(4). We will only reverse the factual findings that the trial court relied upon in its departure decision only if they are clearly erroneous. *Diaz-Villafane*, 874 F.2d at 49.

B. *Reasonableness of Departure*

Burns maintains that the trial court erred in departing from the Guidelines. He contends that the concealment and duration factors upon which the trial judge relied in her departure decision had already been contemplated by the Sentencing Commission and thus could not form a separate basis for departure. Burns also argues that the trial court's finding that he significantly disrupted government functions was not supported by the record. He further contends that the degree of departure

was unreasonable and that the trial court unfairly failed to give him notice of its intention to depart from the Guidelines. We dispose of each of Burns' arguments in turn.

1. *Concealment*

Burns maintains that because the Guidelines allow upward adjustment for "more than minimal planning," Guidelines §§ 2B1.1 and 2F1.1., his concealment of his theft and false claims through income tax evasion were factors that had already been considered within the Guidelines and therefore could not provide the basis for departure. Burns contends that since his "more than minimal planning" was not extraordinary, departure was unwarranted.

The trial court's upward departure for concealment, which is permitted under § 5K2.9 of the Guidelines, applied to Burns' tax evasion, and not to the fact that he used other elaborate methods to conceal his crimes. Therefore, while the Guidelines discuss an adjustment for "more than minimal planning" for theft of government funds and false claims, this applies only to the planning of those offenses. Burns' evasion of taxes to conceal his embezzlement scheme constituted a separate basis for an upward departure, distinct from the fact that his activities were well planned. Since it is possible to be guilty of tax evasion without concealing other crimes, we conclude that the trial court's decision to depart based on concealment was reasonable.

2. *Duration*

Burns argues that duration was also a factor considered by the Commission under the "more than minimal planning" adjustment and therefore cannot provide a separate ground for departure. He notes that the commentary to the Guidelines states that the "more than minimal planning" adjustment applies to "any case involving repeated acts over a period of time." Guidelines § 1B1.1, note 1(f). Therefore, since the Guidelines already accounted for the duration of his crime, and his theft was not highly unusual when compared to others, Burns contends that the departure decision was erroneous.

The trial court, however, specifically stated that her decision to enhance Burns' sentence was based not simply on planning but upon the prolonged and repetitive nature of Burns' crime. According to the Guidelines' commentary, "more than minimal planning means more planning than is typical for commission of the offense in simple form." Guidelines § 1B1.1, note 1(f). The court properly observed that in incorporating a "more than minimal planning" adjustment into the Guidelines, the Commission did not consider "the number of years and the amount of fraudulent transactions . . . executed" by a defendant. Burns' crime involved 53 separate acts of theft over a six-year period. The trial judge could reasonably have concluded that the duration of *execution*, then, warranted enhancement. We note that a defendant who persists in his criminal activity over a period of years may deserve a harsher sentence than a defendant whose crime was limited in duration because the former has arguably had more opportunities to renounce his illegal schemes.

Accordingly, the trial court's finding that the duration of Burns' crime justified departure, was not dependent upon the amount of planning involved in the crime, and thus was not unreasonable.

3. *Disruption of Government Functions*

Burns argues that because the record does not indicate that his activities caused any disruption of government functions beyond the disruption which is inherent in the offense, the departure decision was erroneous. He notes that the Commission's policy statement regarding disruption of government functions indicates that "unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference." Guidelines § 5K2.7. Burns argues that because his crime went undetected for six years and the money he stole was a tiny fraction of AID's budget, his activities could not have caused a significant disruption of government functions.

The Guidelines contemplate departure for crimes which significantly disrupt the function of the government. We reject Burns' argument that this was not an appropriate case for such departure. The fact that Burns' crimes went undetected for so long does not indicate that his activities caused little disruption. Rather, the record indicates that he diverted government resources and used federal mechanisms to perpetrate his crimes. Such misuse of the government's vendor payment process is clearly disruptive; it diverts federal resources from legitimate to illegitimate recipients.

Although disruption of government functions is an inherent aspect of crimes such as bribery, the Commission's policy statement indicates that "when the conviction is theft . . . and that theft caused disruption of a government function, departure from the applicable guideline more readily would be appropriate." Guidelines § 5K2.0, ¶ 2. In this case, the trial judge found that Burns' misuse of his position resulted in a "disruption of government function" beyond that which naturally accompanies diverting resources from legitimate to illegitimate recipients. Burns' manipulation of AID procurement apparatus required the unwitting assistance of many government personnel, who were diverted from their legitimate tasks by the demands of his scheme. The record demonstrates that Burns relied upon clerks to prepare forms necessary to divert government funds, and that his checks to "Vincent Kaufman" – issued by the United States Treasury – required administrative resources: including time and personnel to process these checks. Burns' illegal use of AID's system of paying its vendors, then, can be readily distinguished from those crimes involving basic theft of government property, such as stealing government supplies. The trial judge's conclusion that Burns' entanglement of two federal departments in his plan constituted disruption of a government function cannot be deemed unreasonable.

4. *Reasonableness of Departure*

Burns argues that the amount of departure – 23 months, or 62 percent above the maximum sentence under the Guidelines – was unreasonable in light of the trial court's reasons for departure and the purposes

behind the punishment. Burns contends that the 60-month sentence is greater than necessary to serve the purposes of retribution, deterrence, incapacitation, and rehabilitation that were contemplated by the Sentencing Reform Act of 1984. 18 U.S.C. § 3553(a). He notes that he has already lost all of his assets and that he must surrender a portion of all future earnings. Moreover, as he will never work for the government again, he asserts that excessive punishment is unnecessary to protect the public from his crimes. Finally, he argues that his financial skills will go to waste in prison and could better benefit society if he were released sooner.

The trial court is best situated to decide the length of the sentence and its finding should not be reversed unless it is arbitrary or capricious. *United States v. Juarez-Ortega*, 866 F.2d 747, 748 (5th Cir. 1989). We cannot conclude that the sentence of 60 months is unreasonable. The trial judge offered three specific and legitimate grounds for departure, and it is not the place of this court to second-guess her sentencing decision. *See United States v. Roberson*, 872 F.2d 597, 606-607 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 175 (1989).

C. *Notice of Intention to Depart*

Burns maintains that the trial court erred by failing to give him an opportunity to comment on its intention to depart from the Guidelines. He notes that Federal Rule of Criminal Procedure 32(a)(1) requires the court to give both sides notice of the probation officer's presentence report, including any factors indicating that departure from the Guidelines would be appropriate. Furthermore,

at the sentencing hearing, counsel must be given an opportunity "to comment upon the probation officer's determination and on other matters relating to the appropriate sentence." Burns maintains that Rule 32(a)(1), when read in conjunction with Guidelines § 6A1.3, requiring that the trial court fairly resolve any disputed factor important to sentencing, requires the sentencing judge to notify the parties of her intention to depart and provide them with an opportunity to comment.

Burns' notice argument lacks merit because a requirement that the court inform the parties of its intention to depart is not contemplated by Rule 32. Such a requirement would constitute a radical deviation from past practice and would impose a cumbersome burden on trial judges. Since the defendant had an opportunity to address the court before sentencing during his allocution and has a right to appeal his sentence, he has not been harmed by the trial court's lack of notice.

Despite the contrary conclusions of certain circuits, *see, e.g., United States v. Nuno-Para*, 877 F.2d 1409, 1415 (9th Cir. 1989); *United States v. Cervantes*, 878 F.2d 50, 55 (2d Cir. 1989); *United States v. Otero*, 868 F.2d 1412, 1415 (5th Cir. 1989), we do not see any language in Rule 32 or the commentary requiring the sentencing court to provide the parties with advance notice of its intention to depart from the Guidelines. Pre-Guidelines sentencing procedures never called for such notice of the judge's intention to deviate from a plea bargain or a probation officer's recommendation. This is not a case in which the court is going beyond the facts in the presentencing report in deciding to depart from the Guidelines. All of

the facts that formed the basis of Judge Johnson's decision were contained in the presentencing report, and Burns could have challenged the factual findings if he had believed that they were erroneous. Concededly, a defendant will have less incentive to challenge these facts if he expects a sentence within the Guideline range. Burns is not challenging the facts – his 53 separate instances of theft over a six-year period and his tax evasion – which formed the basis for the trial judge's departure decision. His right to appeal preserves his ability to challenge the *legal* ground on which the departure decision rests.

Finally, because defense counsel and the defendant are allowed to address the court prior to sentencing, the defendant has been given an opportunity to persuade the trial judge why sentencing within the Guidelines is warranted. Although the defendant might have made a stronger argument for himself if he had known that the judge was intending to depart from the Guidelines and the reasons for such a departure, we do not see any language in Rule 32 or the Guidelines requiring the judge to tell the defendant he should make his best case.

The Guidelines are relatively new and are only beginning to be tested. It is true, as Burns points out, that the Guidelines envision a more formalized sentencing process. Guidelines § 6A1.3, Commentary ¶ 1. However, without a more specific command from Congress or the Commission, we do not conclude that the process must include advance notice of the trial judge's decision to depart from the Guidelines.

D. *The Plea Bargaining Procedure*

Although we do not find merit in Burns' notice argument, we are troubled by the plea bargaining procedure used in this case. The plea agreement reached between Burns and the government specifically provided that if either the probation office or the trial court reached a calculation different from the 30 to 37 months that the parties had agreed on, the plea bargain would be null and void. However, the agreement did not mention what the consequences were to be if the judge decided to depart from the suggested sentencing range.

We note that the defendant has waived his right to withdraw his guilty plea and face a trial. Therefore, the question as to whether he should be able to withdraw his guilty plea in light of the trial judge's decision to enhance his sentence is not at issue. Nonetheless, we are disturbed by the ambiguity in the language of the plea agreement regarding what should happen if the trial judge decided to depart from the suggested range. We realize that the Sentencing Guidelines are new to both prosecutors and defense attorneys and that such unforeseen situations may arise from time to time. We think it would be appropriate for prosecutors to modify the plea bargain agreement language to make clear that the bargain either contemplates the trial judge exercising her enhancement powers, or allows the defendant to withdraw his plea if the trial judge contemplates enhancement. If the language is left in its present vague form, a serious question could arise as to whether a defendant has reserved the power to withdraw a plea if the trial judge decides to depart from the sentencing range that the parties agreed upon.

III. CONCLUSION

Because the trial judge articulated three legitimate reasons why departure from the Guidelines was appropriate, her decision to impose a sentence in excess of the 30 to 37 month recommended range should not be disturbed. As the defendant has not been harmed by the trial court's failure to give him notice of its intention to depart from the Guidelines, and since such a notice requirement does not appear on the face of Rule 32 or within the Guidelines, we affirm.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Caption Omitted In Printing]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Mikva, Silberman and D. H. Ginsburg, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in this cause is hereby affirmed in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:

/s/ Constance L. Dupre, Clerk

Date: January 12, 1990

Opinion for the Court filed by Circuit Judge Mikva

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Caption Omitted In Printing]

BEFORE: Mikva, Silberman and D. H. Ginsburg, Circuit Judges

ORDER

Upon consideration of Appellant's Petition for Rehearing, filed February 23, 1990, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Deputy Clerk

[Filed March 15, 1990]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Caption Omitted In Printing]

BEFORE: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, and Thomas, Circuit Judges

ORDER

Appellant's Suggestion For Rehearing *En Banc* has been circulated tc the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Deputy Clerk

Circuit Judge Thomas did not participate in this matter.

[Filed March 15, 1990]

SUPREME COURT OF THE UNITED STATES

No. 89-7260

William J. Burns,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the District of Columbia Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 28, 1990

No. 89-7260

In The

Supreme Court of the United States

October Term, 1990

WILLIAM J. BURNS,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To the United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether a judge may impose a sentence that departs from the applicable guideline range of the Sentencing Guidelines when the defendant has no notice of, nor any opportunity to comment upon, the intended departure and the factors on which it would be based.

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OPINIONS AND JUDGMENTS IN THE COURTS BELOW

The opinion of the court of appeals, (J.A. 74-87), is reported at 893 F.2d 1343 (D.C. Cir. 1990). The judgment of the court of appeals, (J.A. 88), is unreported. The judgment of the district court, (J.A. 64-69), and its memorandum order, (J.A. 70-73), are unreported.

STATEMENT OF JURISDICTION

The jurisdiction of this Court to review the judgment of the court of appeals is invoked under 28 U.S.C. § 1254(1) (1988). The judgment of the court of appeals was entered on January 12, 1990. A petition for rehearing with a suggestion for rehearing *en banc* was denied on March 15, 1990. As rehearing was timely sought below, under Rules 13.1 and 13.4 of this Court, the petition for certiorari was required to be filed within ninety days of the date that rehearing was denied, or by June 13, 1990. The petition was filed with this Court on April 19, 1990.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES, AND GUIDELINES INVOLVED

The verbatim pertinent text of the following constitutional provision, statutes, guidelines, and rules is contained in the appendix to this brief:

1. U.S. Const. amend. V
2. 18 U.S.C. § 3553 (1988)
3. 18 U.S.C. § 3742 (1988)

4. Fed. R. Crim. P. 32 (1982)
5. Fed. R. Crim. P. 32 (1988)
6. United States Sentencing Commission, *Guidelines Manual*, ch. 1, pt. A.3 (1988)
7. United States Sentencing Commission, *Guidelines Manual*, ch. 1, pt. A.4(b) (1988)
8. United States Sentencing Commission, *Guidelines Manual*, § 1B1.1, *Commentary Application Notes*: 1(f) (1988)
9. United States Sentencing Commission, *Guidelines Manual*, § 2B1.1(b)(4), *Larceny, Embezzlement, and Other Forms of Theft* (1988)
10. United States Sentencing Commission, *Guidelines Manual*, § 2F1.1(b)(2)(A), *Fraud and Deceit* (1988)
11. United States Sentencing Commission, *Guidelines Manual*, § 2T1.1(b)(1), *Tax Evasion* (1988)
12. United States Sentencing Commission, *Guidelines Manual*, § 4A1.3, *Adequacy of History Category* (Policy Statement) (1988)
13. United States Sentencing Commission, *Guidelines Manual*, § 5K2.0, *Grounds for Departure* (Policy Statement) (1988)
14. United States Sentencing Commission, *Guidelines Manual*, § 6A1.3, *Resolution of Disputed Factors* (1988)

STATEMENT OF THE CASE

Petitioner, William J. Burns, challenges the district court's failure to provide notice of, and an opportunity to comment on, its intention to impose a sentence of incarceration well beyond that contemplated by the: 1) Federal Sentencing Guidelines ("Guidelines"); 2) plea agreement; and 3) presentence investigation report ("PSI report").

From 1967 to July 1988, Burns was employed by the United States Agency for International Development ("AID"). (J.A. 19). In 1982, as a supervisor in the agency's Financial Management Section, Burns was authorized to order the U.S. Treasury to make payments to vendors on the agency's behalf. (J.A. 13). From February 25, 1982 through May 26, 1988, he prepared false authorization forms for payments in the name of Vincent Kaufman and submitted the forms to the U.S. Treasury. (J.A. 13-14). The forms instructed the Treasury Department to draw a check on an account allocated to AID and send the check to the Signet Bank to be deposited in the name of Vincent Kaufman. (J.A. 13). The Kaufman account was under Burns' control, and he withdrew money from the account for his personal use. *Id.* Over the six-year period, the Treasury Department issued 53 such checks in response to Burns' fraudulent applications. *Id.* The amount stolen totals $1,261,184.92, and the outstanding tax obligation on this unreported income is $475,685. (J.A. 14).

In December 1987, AID officials conducted a routine background check required to maintain Burns' security clearance. (J.A. 13). They became suspicious upon learning that Burns' home was valued at over $400,000 despite his annual income of $35,108. *Id.* The officials then conducted a credit check and an investigation of pertinent bank records. *Id.* Those records and a subsequent internal investigation revealed Burns' diversion of money from the agency's travel fund. *Id.* After the investigation uncovered the fraud, Burns submitted two additional fraudulent forms to the U.S. Treasury, which, though

never paid, constituted false claims against the Government. (J.A. 75-76). Burns was arrested on July 12, 1988. (J.A. 1).

On August 11, 1988, Burns and the Government entered into an agreement whereby Burns agreed to waive indictment and plead guilty to one count of theft of government funds, 18 U.S.C. § 641, one count of false claims against the Government, 18 U.S.C. § 287, and one count of attempting to evade income tax, 26 U.S.C. § 7201. (J.A. 5-10). Burns also entered into a comprehensive restitution agreement, under which the Government will recover between $600,000 and $700,000 from him. (J.A. 20).[1] He agreed to surrender to the Government future earnings that exceed a specified amount until his debt is repaid, (J.A. 7), and was stripped of all claim to his retirement fund, (J.A. 42).

The plea agreement noted that all parties "understood" that the case would be covered by the Guidelines and that each party "assumed that a sentencing range of Level 19, Criminal History Category I," would determine

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[1] Burns also agreed to cooperate with the Government by submitting to debriefings regarding the money he obtained from the travel fund. (J.A. 6). Both Burns and his wife, Kathy Burns, agreed to make restitution by surrendering essentially all of their assets to the Government. (J.A. 6-8). Mrs. Burns was only permitted to retain the following items: 1) property and funds that she could establish were not acquired directly from her husband or obtained with funds acquired from him; 2) one automobile; 3) $10,000 in funds, less any property and funds retained because they were not acquired directly or indirectly from her husband; and 4) necessary household items, one wedding and engagement ring set, and wedding gifts. (J.A. 6-7).

the sentence. (J.A. 5-6). In the PSI report, the probation officer's sentencing calculations determined that this assumption was correct and that the applicable guideline range was 30 to 37 months.[2] (J.A. 16). The probation officer concluded that the case involved "no factors that would warrant departure from the guideline sentence." (J.A. 21). Both Burns and the attorney for the Government reviewed the PSI report, and neither filed any objections. (J.A. 32-33).

After according defense counsel, the attorney for the Government, and Burns their right to address the court, Judge Johnson imposed sentence. She agreed with the probation officer's calculation of the applicable sentence, stating that "[t]he guidelines which apply to this case do indeed reflect that the appropriate sentence is within the range of 30 to 37 months." (J.A. 52). However, the judge decided that "the appropriate sentence can only be effected if the court departs from the guidelines." *Id.* As

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[2] The base offense level for counts 1 and 2 was determined to be 17. (J.A. 14). This was increased two levels to 19 because Burns was a public servant who violated a trust and used a special skill in a manner to significantly facilitate the commission of the offense. (J.A. 15). The base offense level for Count 3 was 14, which was increased two levels to 16, because Burns failed to report more than $10,000 of income derived from criminal activity in any year. *Id.* The combined adjusted offense level was 21, which represented the higher of the two base levels (19), plus the total number of offense units (2). (J.A. 15). This number was reduced two levels because Burns accepted responsibility, resulting in a total offense level of 19. (J.A. 15-16). Based on a criminal history category of 1, the guideline imprisonment range was determined to be 30-37 months. (J.A. 16).

required by 18 U.S.C. § 3553(c)(2) (1988), Judge Johnson stated the reasons for the departure, finding that three factors were involved in the offense "which [she felt] the guidelines either fail to address or to consider adequately." (J.A. 53). Those factors, which the judge elaborated upon both at the hearing and in a memorandum order filed the same day, were: 1) "the Guidelines, in considering the severity of the offenses, do not sufficiently weigh the duration of [Burns'] criminal conduct," *id.*; 2) Burns "caused significant government disruption by stealing government funds in excess of one million dollars and by way of 53 separate fraudulent instruments," (J.A. 55); and 3) "[b]y continually evading the payment of . . . taxes, [Burns] conceal[ed] crimes of theft and false claims," *id.* Judge Johnson stated:

> For these reasons, I find that several important elements of the crimes committed by you are not adequately considered by the sentencing guidelines, thus warranting a departure from its prescription. This being the case, the court relies upon its own judgment and experience and finds that the guideline range for the offenses which you committed must be departed from.

Id. The judge then imposed a sentence of 60 months incarceration followed by three years of supervised release and 100 hours of community service per year for each of the three years of the supervised release. (J.A. 55-56). After noting that Burns had agreed to a restitution agreement with the Government, Judge Johnson informed him of his right to appeal and to appointed counsel, and then ordered him to step back with the marshal. (J.A. 57).

Burns' counsel then asked the court to consider delaying incarceration until the Bureau of Prisons designated the facility at which he would be incarcerated, but this request was denied. (J.A. 60). The hearing adjourned at 3:40 P.M., (J.A. 63), and that same day Judge Johnson filed a four and one-half page typewritten memorandum order explaining her determination to sentence Burns more severely than the Guidelines recommended. (J.A. 70-73).

Burns appealed the sentence to the United States Court of Appeals for the District of Columbia Circuit. (J.A. 1). The court of appeals rejected, *inter alia*, the claim that is presented here for review. Noting contrary conclusions in certain circuits, (J.A. 84), the court held that notice of the possibility of a departure is not contemplated by Fed. R. Crim. P. 32 ("Rule 32") and stated that "without a more specific command from Congress or the [Sentencing] Commission, we do not conclude that the process must include advance notice of the trial judge's decision to depart from the Guidelines." (J.A. 85).

A petition for rehearing and a suggestion for rehearing *en banc* were denied on March 15, 1990. (J.A. 89-90). This Court granted Burns' petition for certiorari on June 28, 1990. (J.A. 91).

SUMMARY OF ARGUMENT

Before imposing sentence, the court must grant both the defendant and his counsel the right to address the court. Rule 32(a)(1)(B), (C). Independent of these provisions, Rule 32(a)(1) also guarantees that both counsel for

the defendant and the attorney for the Government shall have the "opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence" before sentence is imposed under the Guidelines. Implicit in the right to comment provided by Rule 32(a)(1) is the right to notice that a judge, acting *sua sponte*, intends to depart from the Guidelines. Absent such notice, the right to comment on a matter critical to the sentencing process is defeated.

A. The power to depart from the guideline range for sentencing, though discretionary, is limited by statute to situations where the Guidelines do not adequately consider an aggravating or mitigating circumstance. 18 U.S.C. § 3553(b) (1988). Ordinarily, either the PSI report or the attorney for the Government will indicate that departure may be appropriate. The defendant will then be assured of notice of the potential for departure and will have an opportunity to comment before the imposition of sentence. Rule 32(c)(3)(A). Only in the situation presented here, where departure is suggested solely by the judge, does notice become an issue. Given that the grounds for departure from the applicable sentencing range are not readily discernible, counsel for the parties must be given prior notice of the judge's intent to depart to be able to challenge the accuracy of the factors used and the "propriety of their use for departure." *United States v. Kim*, 896 F.2d 678, 681 (2d Cir. 1990). Without notice, counsel cannot reasonably be expected to anticipate and prepare arguments against departure.

A notice requirement in this context is consistent with the congressional goals to make criminal sentencing fairer and more certain. Rule 32 and other sentencing

rules and guidelines reflect a clear preference for informed participation by the parties during the sentencing process. For example, Rule 32(c)(3)(A) ensures that the parties are cognizant of the probation officer's assessment of the relevant sentencing factors and allows the parties to challenge the facts and conclusions contained in the PSI report. It would be inconsistent to give the parties notice and allow comment on the propriety of a departure recommendation contained in the PSI report but not to give them notice and an opportunity to comment when the judge intends to depart. In sum, whether the court analyzes the plain language of Rule 32 or reviews the rule in the broader context of guideline sentencing, notice of the judge's intent to depart *sua sponte* is required.

B. Even if Rule 32(a)(1) cannot be read to require notice of the judge's decision to depart, the right to notice should be accorded as a matter of procedural due process. *See, e.g., Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality) ("it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause"). When the *Mathews v. Eldridge*, 424 U.S. 319 (1976), balancing test is applied to evaluate whether due process requires notice in this case, it is clear that the interest in fair and accurate sentencing can only be effectuated if the judge provides notice of the intent to depart from the Guidelines. Further, giving notice will place no significant added burden on the court or the Government.

C. The court of appeals determined that Burns was not prejudiced by the lack of notice for the following reasons: 1) "[a]ll of the facts that formed the basis of

Judge Johnson's decision were contained in the presentencing report"; 2) Burns "had an opportunity to address the court before sentencing during his allocution"; and 3) Burns had the right to appeal his sentence. (J.A. 84-85). None of these points are valid.

First, to the extent the facts supporting the judge's departure decision can be gleaned from the PSI report, they are present in entirely different contexts in a report that ultimately states there are *no* grounds for departure. (J.A. 21). If anything, the PSI report eliminated any concern about departure. Second, though Burns and his counsel addressed the court, neither addressed any proposed basis for departure. The harm resulting from counsel's inability to make arguments addressing the court's grounds for departure was not mitigated because counsel addressed other matters. Finally, a right to appeal from a discretionary decision is a poor substitute for the right to influence the decision before it is made.

ARGUMENT

I. PRIOR TO HEARING FINAL COMMENTS FROM THE PARTIES AND IMPOSING SENTENCE, A DISTRICT COURT MUST GIVE NOTICE IF IT IS CONSIDERING DEPARTURE FROM THE SENTENCING GUIDELINES WHERE DEPARTURE HAS NOT BEEN RAISED BY THE PARTIES OR BY THE PRESENTENCE INVESTIGATION REPORT

With the adoption of the Guidelines, Rule 32(a)(1) was amended to require the district court to allow both parties an opportunity to comment on the probation officer's determinations and "on other matters relating to the

appropriate sentence" before sentence is imposed.[3] In this case, Burns and his counsel were given an opportunity to address the court, but they had no notice that the judge disagreed with the PSI report conclusion that there was no basis for departure from the 30-37 month guideline range. Unbeknownst to counsel, the court was considering three specific grounds for imposing a more severe sentence than the Guidelines contemplated, and counsel's comments did not address the court's concerns. (J.A. 39-48). Only after the parties concluded their comments did the judge reveal her assessment of the case and impose her sentence of 60 months imprisonment. (J.A. 49-56). The failure of the court to give notice before hearing final comments, when it had rejected the findings in the PSI report and was considering an upward departure from the Guidelines, violated petitioner's rights under Rule 32(a)(1) and deprived him of due process of law under the fifth amendment to the United States Constitution.

A. Because Rule 32(a)(1) guarantees the right to comment on matters relating to the appropriate sentence, the district court must give the parties notice before it imposes sentence if it is considering a sentence outside the Guidelines based on reasons not identified by the parties or the PSI report as possible grounds for departure

The court of appeals below is the only circuit court that has held that the right to comment articulated in

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[3] This right is separate from the more comprehensive right of defense counsel to address the court, Rule 32(a)(1)(B), and the defendant's right of allocution, Rule 32(a)(1)(C).

Rule 32(a)(1) does not include the right to notice if the sentencing judge is considering a departure from the Guidelines.[4] (J.A. 84-85). The court's construction

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[4] Every other court of appeals decidin; this issue has concluded that the language of Rule 32(a)(1) requires reasonable notice, before counsel's comments are concluded, if the judge is considering an upward departure from the guideline range and departure has not been suggested in the PSI report. *United States v. Sands*, No. 89-5475 (8th Cir. July 10, 1990) (1990 U.S. App. LEXIS 11565) (where the PSI report contained no facts supporting departure and stated that no factors existed that warranted departure, defendant was improperly denied notice of facts on which departure was based and an opportunity to rebut those facts); *United States v. Landry*, 903 F.2d 334, 340 (5th Cir. 1990) (involvement of a minor in drug trafficking as a basis for upward departure was not raised in the PSI report or by the parties as a basis for departure, therefore, defendant was denied the opportunity to address the court on that issue); *United States v. Hedberg*, 902 F.2d 1427, 1428-29 (9th Cir. 1990) (PSI report did not mention possible departure based on vulnerable victim adjustment and judge did not inform defendant of possible departure prior to sentencing); *United States v. Williams*, 901 F.2d 1394, 1401 (7th Cir. 1990) (if sentencing court relies on factors not raised in PSI report, court must highlight those factors and allow defense counsel an opportunity to address them before sentence is imposed); *United States v. Anders*, 899 F.2d 570, 576-77 (6th Cir. 1990) (sentence affirmed because PSI report provided defendant with notice that departure might be warranted on several specified grounds); *United States v. Hernandez*, 896 F.2d 642, 644 (1st Cir. 1990) ("a criminal defendant must have notice of any facts that will affect his sentence and meaningful opportunity to respond"); *United States v. Palta*, 880 F.2d 636, 640 (2d Cir. 1989) ("Adequate notice and the opportunity to contest an upward departure from the guidelines are indispensable to sentencing uniformity and fairness."); *United States v. Cervantes*, 878 F.2d 50, 56 (2d Cir. 1989) (noting that the rationale underlying

(Continued on following page)

unjustifiably narrows the right to comment mandated by Rule 32(a)(1), limiting it in a way that is inconsistent with the rule's plain meaning and at odds with the overall scheme of the Guidelines and related statutes and rules.[5]

(Continued from previous page)

notice and comment requirements of Rule 32 "also applies to the grounds for an upward departure, especially where the judge relies upon factors not addressed in the presentence report or which, if mentioned, have been recast by the judge"); *United States v. Nuno-Para*, 877 F.2d 1409, 1415 (9th Cir. 1989) (basis for departure must be identified as such in the PSI report or the court must advise the defendant "that it is considering departure based on a particular factor and allow defense counsel an opportunity to comment") (footnote omitted); *United States v. Otero*, 868 F.2d 1412, 1415 (5th Cir. 1989) (judge did not comply with Rule 32(a)(1) comment requirement when the purity of cocaine as a basis for upward departure was first mentioned when sentence was imposed).

[5] Congress provided no legislative history explaining why Rule 32(a)(1) was amended in 1984 to include the language: "At the sentencing hearing, the court shall afford the counsel for the defendant and the attorney for the Government an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence." Whether notice is required, therefore, must be determined by 1) the plain language of the provision, and 2) the underlying policies of fairness and accurate sentencing that inspired the Guidelines. *See Hallstrom v. Tillamook County*, 110 S. Ct. 304, 308 (1989) ("[t]he starting point for interpreting a statute is the language of the statute itself"); *United States v. Rutherford*, 442 U.S. 544, 552 (1979) (exceptions to clearly delineated statutes will be implied to prevent "consequences obviously at variance with the policy of the enactment as a whole"); *see also* 2A N. Singer, *Sutherland Statutory Construction* §§ 44.01, 46.05, 58.06 (Sands 4th ed. 1984).

While the language of Rule 32(a)(1) does not expressly state that notice is required, the amended provision allowing an "opportunity to comment" on the appropriate sentence must be read to require the judge to provide advance notice of an unanticipated upward departure so that the parties can exercise the right to comment. In amending Rule 32(a)(1), Congress recognized that counsel specifically needed an opportunity to comment on matters relating to the appropriate sentence apart from counsel's general right to address the court and the defendant's right of allocution. A comparison of the rule's language prior to and after its amendment reflects Congress' intent to provide the parties with an opportunity to comment specifically on matters relevant to sentencing under the Guidelines. Prior to its amendment, Rule 32(a)(1) simply stated that "[s]entence shall be imposed without unreasonable delay" and provided for counsel's and the defendant's right to address the court. Fed. R. Crim. P. 32(a)(1) (1982). In contrast, amended Rule 32(a)(1) requires, among other things, that the judge provide both parties with notice "of the sentencing classifications and sentencing guideline range believed to be applicable to the case" and with "an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence." In language similar to that contained in the prior version, the rule also provides that counsel and the defendant have a right to address the court generally.

The new "comment" language in amended Rule 32(a)(1) must provide the parties with the right to comment on the appropriate sentence under the Guidelines; otherwise, the language would be rendered superfluous

because counsel and the defendant already have the right to address the court generally at sentencing. *See Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307-08 (1961) (declining to adopt a strained reading of a statute "which renders one part a mere redundancy"); 2A N. Singer, *Sutherland Statutory Construction*, § 46.06, at 104 (Sands 4th ed. 1984) ("statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant"). Because the judge's intention to depart from the applicable guideline range is a "matter[] relating to the appropriate sentence," the notice and comment requirements of Rule 32(a)(1) encompass notice of, and an opportunity to comment on, departure.

Disclosure of the judge's intention to depart from the applicable guideline range also is consistent with notice requirements in other provisions of Rule 32. Subdivision (c)(3)(A) ensures that the parties are cognizant of the probation officer's assessment of relevant sentencing factors well in advance of the hearing and also allows the parties to challenge the conclusions and the facts contained in the PSI report, including any recommendations for a departure from the Guidelines. The policy that guides the rule is that disclosure of relevant information before imposition of sentence is essential. There is no reason to conclude that this policy was not intended to apply when the judge recognizes potential grounds for departure that were not identified in the PSI report.[6]

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[6] Even when the parties or the PSI report specifically state grounds for departure, the court should give notice that it is

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Further, when Rule 32 is read in the context of the policy underlying the Guidelines, the need for notice is clear. Prior to the adoption of the Guidelines, sentencing was largely an exercise of broad judicial discretion. Congress enacted the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984), to "structure judicial sentencing discretion, eliminate indeterminate sentencing . . . and make criminal sentencing fairer and more certain." S. Rep. No. 225, 98th Cong., 2d Sess. 65, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182, 3248.[7] The goals of fairness and certainty can be better

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considering a departure from the Guidelines because notice can only help focus the discussion at the sentencing hearing. Nevertheless, where the parties are on notice from the PSI report or from each other that a departure is being considered, the need for the judge to disclose that he or she is contemplating a departure is less critical and may not constitute reversible error. *Anders*, 899 F.2d at 576-77; *United States v. Ramirez Acosta*, 895 F.2d 597, 601 (9th Cir. 1990).

[7] The Sentencing Commission promulgated Guidelines that establish base offense levels with upward or downward adjustments based on the presence or absence of several specified factors. *See* U.S.S.G., ch. 2 (Offense Conduct); U.S.S.G., ch. 3 (Adjustments). The resulting calculation establishes a sentencing range for the offense. U.S.S.G., ch. 5 (Determining the Sentence). To promote consistency in sentences, the sentencing judge may depart from the applicable sentence range only when he or she finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b) (1988). The sentencing judge must perform a fairly complex analysis to determine

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served by informed comment by the parties,[8] made after proper notice of the factors that are relevant to sentencing.

Moreover, requiring notice under Rule 32(a)(1) follows from the highly structured review process mandated by the Guidelines. The guideline sentencing scheme requires significant informed participation by the parties and a U.S. probation officer. The probation officer compiles the PSI report that, among many other things, must ascertain the appropriate guideline range for the offenses and explain "any factors that may indicate that a sentence of a different kind or of a different length from one within the applicable guideline would be more appropriate under all the circumstances." Rule 32(c)(2)(B).

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whether a circumstance was adequately taken into consideration and must "consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." *Id.*

[8] A Rule 32(a)(1) notice requirement would apply to both the defense and the Government. The Government is also disadvantaged by departure without notice because it is then denied the opportunity to comment on the factors identified by the judge to justify downward departure, such as cooperation with the Government or calculation of the defendant's criminal history. The Government itself recently appealed an unannounced downward departure, raising arguments similar to those that petitioner raises here. *United States v. Goff*, No. 89-5656, slip op. at 6, n.4 (4th Cir. July 6, 1990) (1990 LEXIS U.S. App. 11422) (raising the argument that "failure of the district court to give the government notice of and an opportunity to comment on this departure basis before imposing sentence violates Federal Rule of Criminal Procedure 32(a)(1)").

Following compilation of the PSI report, the court must provide both parties with "notice of the probation officer's determination . . . of the sentencing classifications and sentencing guideline range believed to be applicable to the case."[9] Rule 32(a)(1). If the defendant then alleges any factual inaccuracies in the PSI report, the court must conduct an appropriate review, taking testimony if needed, and make findings unless the court concludes that no resolution of the dispute is necessary because the disputed matter will not affect sentencing. Rule 32(c)(3)(A), (D). The court must determine that the defendant and defendant's counsel have had an opportunity to read and discuss the PSI report and then must entertain comments from the defendant, defendant's counsel, and the attorney for the Government regarding the appropriate sentence. Rule 32(a)(1)(A), (B), (C).

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[9] This step is subject to several variables. In most circumstances the court must provide defendant's counsel with a copy of the PSI report, including the probation officer's calculation of the guideline classification of the offense, at least ten days (unless waived) before sentence is imposed. Rule 32(c)(3)(A). This disclosure should not include: 1) final recommendations of the probation officer; 2) diagnostic opinions where disclosure might seriously disrupt a program of rehabilitation; 3) information that, if disclosed, would breach a promise of confidentiality; or 4) any information which, if disclosed, could be harmful to the defendant or others. *Id.* If the court withholds all or part of the PSI report under Rule 32(c)(3)(A), it must: "state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant and the defendant's counsel an opportunity to comment thereon." Rule 32(c)(3)(B).

The right to comment on "other matters relating to the appropriate sentence" can only be harmonized with these other provisions of the rule if it includes a right to notice when the court considers departure based on a factor that has not been identified as relevant by the parties or the PSI report. Under the structure now required for sentencing, the parties should not be expected to guess whether the judge is contemplating a departure from the Guidelines. Rather, relevant factors must be disclosed and discussed before the judge decides the appropriate sentence.

Notice is also warranted because of the complexity of the departure decision. The parties cannot be expected to routinely hypothesize every conceivable basis for a departure, conduct research and construct appropriate arguments, and then decide whether or not it is strategically sound to mention departure.[10] Without notice, the parties will not be able to challenge the accuracy of factors used by the judge or to challenge the "propriety of

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[10] There are two types of departures from the Guidelines. The first type is commonly known as "Commission-identified" departures because they are listed in the commentary accompanying specific Guidelines and in policy statements. *See, e.g.*, U.S.S.G. §§ 4A1.3, 5K2.0. The second type, known as "judicially-created" departures, involves aggravating and mitigating circumstances not specifically identified by the Commission as potential bases for departure, but which the sentencing court determines justify departure. *United States v. Summers*, 893 F.2d 63, 67 (4th Cir. 1990). The Sentencing Commission anticipated that "judicially-created" departures would be "highly unusual." U.S.S.G., ch. 1, pt. A.4(b).

their use for a departure." *United States v. Kim*, 896 F.2d 678, 681 (2d Cir. 1990).[11]

The court of appeals below concluded that requiring district courts to give this type of notice to defendants would constitute a "radical deviation" from pre-guidelines practice, (J.A. 84), which it would not do without clear direction from Congress or the U.S. Sentencing Commission ("Sentencing Commission"). (J.A. 85). This observation overlooks the fact that 1) the Sentencing Commission has provided guidance on this issue, and 2) post-guideline practice is intended to be more formalized than pre-guideline practice:

> In current practice, factors relevant to sentencing are often determined in an informal fashion. . . . This situation will no longer exist under sentencing guidelines. The court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. *More formality is therefore unavoidable if the sentencing process is to be accurate and fair.* . . . When a reasonable dispute exists about *any* factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information.

[11] Similarly, this Court has held in another context that a notice requirement may be implicit when a right would be meaningless without notice. *Oyler v. Boles*, 368 U.S. 448, 452 (1962) ("[I]t would [be] an idle accomplishment to say that due process requires counsel [at a habitual offender proceeding] but not the right to reasonable notice and opportunity to be heard.").

U.S.S.G. § 6A1.3, commentary (emphasis added).[12] Part of this new "formality" must include a meaningful opportunity for the defendant to challenge an upward departure.

Thus, whether the Court analyzes the plain language of the rule or reviews it in the broader context of guideline sentencing, Congress expected that counsel would be afforded an opportunity to comment on matters relevant to the appropriate sentence. That expectation is defeated when the court withholds notice that it intends to depart *sua sponte* from the applicable guideline range.

B. Notice that the court is considering an upward departure is required as a matter of fundamental procedural due process

If Rule 32(a)(1) does not by its own terms require notice of an impending upward departure, such notice must be afforded as a matter of procedural due process of law. Fifth amendment guarantees of due process govern sentencing proceedings. *See, e.g., Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality) ("it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause"); *United States v. Rone*, 743 F.2d 1169, 1171 (7th Cir. 1984)

[12] The district court departed from the Guidelines because it found "at least three factors involved in the defendant's offenses which the Guidelines either fail to address or to consider adequately." (J.A. 71). As neither the parties nor the PSI report concluded that these factors were present, their existence was reasonably in dispute, albeit the dispute was not known to the parties.

("[c]onvicted defendants, including those who plead guilty, have a due process right to a fair sentencing procedure").

This Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), fashioned a three-part test that evaluates whether a given procedure satisfies the due process requirements. The *Mathews* test serves to balance the "governmental and private interests that are affected" by the procedure in question. *Id.* at 334. The three factors are:

> first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.[13]

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[13] Although *Mathews* addressed administrative termination of Social Security benefits, the *Mathews* analysis for due process sufficiency has been used to review sentencing procedures. *E.g., United States v. Sanchez*, Nos. 89-50427, 89-50428, 89-50433, slip op. at 3 (9th Cir. July 17, 1990) (1990 LEXIS U.S. App. 12026) (sentencing under Guidelines satisfies *Mathews* test, provided defendant receives notice of intended upward departure and opportunity for comment); *United States v. Pugliese*, 805 F.2d 1117, 1122-23 (2d Cir. 1986) (applying *Mathews* test in reviewing sentencing judge's reliance on transcript of separate proceeding before other judge). *But see United States v. Ramirez-De Rosas*, 873 F.2d 1177, 1179 (9th Cir. 1989) (declining to apply *Mathews* outside the context of an administrative proceeding).

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Applying the first *Mathews* factor, "it is clear that [the defendant's] interest in sentencing could not be stronger because his future liberty will be determined by the sentence imposed." *United States v. Romano*, 825 F.2d 725, 729 (2d Cir. 1987); *see also United States v. Pugliese*, 805 F.2d 1117, 1122 (2d Cir. 1986) ("interest of an offender at sentencing could not be greater"). Here, the judge's decision to depart imposed on Burns an additional 23 to 29 months in prison. (J.A. 52-56).

Second, notice that a sentencing judge is contemplating an upward departure will alert counsel to the need to present any available challenges. *United States v. Kim*, 896 F.2d 678, 681 (2d Cir. 1990). Thus, a requirement for notice and an opportunity to comment will reduce the risk that the judge will overlook a compelling argument that departure from the Guidelines is unnecessary or even erroneous.

The sentencing judge enjoys a certain amount of discretion in determining which factors warrant an upward

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Nothing in the *Mathews* factors applies uniquely to administrative actions. Rather, the *Mathews* test sets forth a generic, interest-based analysis applicable to a variety of contexts. *See, e.g., United States v. Raddatz*, 447 U.S. 667, 677 (1980) (applying *Mathews* test to statutory provision allowing federal court to accept magistrate's assessment of credibility of testimony in ruling on suppression of evidence in criminal case); *Greenholtz v. Inmates of the Neb. Penal & Correctional Complex*, 442 U.S. 1, 13 (1979) (citing *Mathews* and noting in review of parole denial that "the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error").

departure from a guidelines sentence. The need for accuracy in a discretionary proceeding demands that there be an "informed exercise of discretion" which is best effectuated when the affected party has notice of the adverse action and a full opportunity to comment. *See Black v. Romano*, 471 U.S. 606, 612 (1985) (due process entitles parolee or probationer, in revocation hearing, not only to refute alleged violations, but to present mitigating excuses or reasoning that revocation is inappropriate under the circumstances). Even when the facts of a case are undisputed, accurate interpretation of those facts can only be fully realized if the defendant is afforded an opportunity to challenge their weight and significance.[14] When a judge avails himself of the affected individual's interpretation of the facts bearing on sentencing, "his discretion will be more informed and . . . the risk of error substantially reduced." *Goss v. Lopez*, 419 U.S. 565, 584 (1975). The subjective quality of sentencing and the opportunity for error, even under the Guidelines, is amply demonstrated here, where the sentencing judge

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[14] *See Goss v. Lopez*, 419 U.S. 565, 584 (1975) (requiring an informal hearing prior to disciplinary action or as soon as practicable by school officials because even when the disciplinarian is certain of the bare facts, "things are not always as they seem to be, and the student will at least have the opportunity to characterize his conduct and put it in what he deems the proper context"); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985) (discussing need for hearing prior to discharge of school district employees because "[e]ven where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect").

disregarded the statement in the PSI report that no factors warranted an upward departure. (J.A. 21). The judge's sentencing decision, however, may have been different if Burns had been able to address specific factors influencing the judge's departure decision. Without notice of the judge's intent to depart and the opportunity to respond, Burns was foreclosed from presenting his views and further informing the judge's decision.[15] Denial of notice has placed Burns at substantial risk of an erroneous deprivation of his liberty interest.

Review of the third *Mathews* prong demonstrates that notice of a guidelines departure would not burden the governmental interest at sentencing. Notice would enable the sentencing judge to hear arguments regarding specific factors on which a departure decision might be based. The resultant increase in accuracy would promote the Government's interest in sentence uniformity and proportionality. *See* U.S.S.G., ch. 1, pt. A.3. (Congress sought to balance "uniformity" and "proportionality" of sentencing in adopting Guidelines).

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[15] The court of appeals below acknowledged the significance of timely notice of departure to the petitioner's ability to effectively advocate his position. (J.A. 85) ("the defendant might have made a stronger argument for himself if he had known that the judge was intending to depart from the Guidelines and the reasons for such a departure"). However, the court failed to recognize the essential connection between such notice and the procedures mandated by due process concerns. It is this type of opportunity to make the strongest argument possible for oneself, in the face of adverse governmental action, that is at the core of due process protection.

There is no fiscal burden associated with the notice that Burns seeks.[16] Requiring notice to accompany the right to comment in Rule 32(a)(1) would not substantially increase the burden already required under the highly structured review process mandated by the Guidelines.[17] A formal procedure for providing notice with an opportunity to comment under Rule 32(a)(1) when a judge

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[16] When analyzing the fiscal burden of a particular practice, the courts have focused on whether due process required provision of a hearing which did not previously exist. *Washington v. Harper*, 110 S. Ct. 1028, 1042 (1990) (requirement for judicial hearings prior to involuntary psychiatric treatment of inmates was unwarranted under due process clause, in part because the hearings would "divert scarce prison resources, both money and the staff's time"); *Romano*, 825 F.2d at 729-30 (request for separate hearing on sentencing information denied because "advantages to be gained from the procedures [were] far outweighed by the fiscal and administrative burdens faced by the government in implementing them"). The extent to which an additional hearing would be necessitated by a notice requirement is very limited. Normally, the sentencing judge would give notice of an intended departure prior to the sentencing hearing contemplated by the Guidelines. Where notice is given at the hearing, there is a risk that a postponement may be necessary but the Guidelines anticipate that some need for postponement may arise. Rule 32(a)(1).

[17] The possibility of an upward departure is not likely to materialize at the last minute. By statute, the judge is required to state the reasons for the departure on the record when sentence is imposed. 18 U.S.C. § 3553(c) (1988). That decision is reviewable on appeal. 18 U.S.C. § 3742(e). Here, it is fairly clear from the record that the judge had considered an upward departure prior to the sentencing hearing. The sentencing hearing was adjourned at 3:40 p.m. and a four and one-half page typewritten memorandum order containing the departure analysis was filed the same day.

intends to depart upward without a recommendation for departure from the PSI report or the Government is consistent with guideline sentencing. It is no more cumbersome than the formal procedure required when the PSI report recommends upward departure. Rule 32(c)(3)(A). The need for additional proceedings is highly unlikely, particularly if the judge gives notice of the intent to depart in advance of the scheduled sentencing hearing.

Ensuring that a defendant is aware of the judge's intent to impose an upward departure and has adequate opportunity to comment on the grounds for departure is not contrary to the Government's interest, nor will it impose significant burdens on the court. Prosecutors, who would themselves be placed on notice of the sentencing judge's concerns, would be able to more effectively argue the Government's position with respect to a departure from the Guidelines. Increased notice may in fact lower costs by facilitating dispute resolution at the trial level, thus eliminating, or at least reducing in scope, some sentence appeals. In sum, the application of *Mathews* to guideline sentencing compels a finding that, if not by statute or rule, as a matter of due process, petitioner was entitled to notice and an opportunity to address the judge's inclination to depart. Because the judge failed to give that notice, Burns is entitled to be resentenced.

II. PETITIONER WAS PREJUDICED BY THE DISTRICT COURT'S FAILURE TO PROVIDE NOTICE THAT IT INTENDED TO DEPART FROM THE APPLICABLE GUIDELINE SENTENCING RANGE

After concluding that there was no right to notice of an upward departure from the Guidelines, the court of

appeals determined that Burns was not prejudiced by the lack of notice because: 1) "[a]ll of the facts that formed the basis of Judge Johnson's decision were contained in the presentencing report"; 2) Burns "had an opportunity to address the court before sentencing during his allocution"; and 3) Burns had the right to appeal his sentence. (J.A. 84-85). The conclusion that Burns was not harmed by the lack of notice is untenable for the reasons set forth below.

First, the mere presence of the facts relied on for departure somewhere in the PSI report does not provide notice that a departure is being considered. As the Ninth Circuit stated in *United States v. Nuno-Para*:

> the presentence report or the court must inform the defendant of factors that they consider to constitute grounds for departure. This requirement is not satisfied by the fact that the relevant information is present within the presentence report. Rather, such information either must be identified as a basis for departure in the presentence report, or, the court must advise the defendant that it is considering departure based on a particular factor and allow defense counsel an opportunity to comment.

877 F.2d 1409, 1415 (9th Cir. 1989) (citations omitted).[18] While the PSI report in this case contained some mention

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[18] Several other cases hold that it is inappropriate for the sentencing judge to depart from the Guidelines, without notice, based upon facts contained in the PSI report, but not identified therein as a ground for departure. *United States v. Landry*, 903 F.2d 334, 340 (5th Cir. 1990); *United States v. Hedberg*, 902 F.2d 1427, 1429 (9th Cir. 1990); *United States v. Otero*,

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of facts that led to the judge's conclusion that a substantial departure was called for,[19] these facts were mentioned in far different contexts, and the PSI report specifically stated that "[t]here are no factors that would warrant departure from the guideline sentence." (J.A. 21). In short, if the PSI report did contain the raw information

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868 F.2d 1412, 1415 (5th Cir. 1989); *see also United States v. Williams*, 901 F.2d 1394, 1400 (7th Cir. 1990) ("Courts have interpreted the rule to require that the grounds for departure must either be identified in the presentence report, *or* by the sentencing court at the defendant's sentencing hearing.") (emphasis in original); *United States v. Cervantes*, 878 F.2d 50, 56 (2d Cir. 1989) ("To the extent the court . . . relied upon matters not mentioned in the report, or not highlighted in a fashion that would clearly convey their significance to defense counsel, [the court] compounded the problem.").

[19] The PSI report made reference to the duration of the criminal conduct, but not in the context of departure. Nor was concealment mentioned in the context of departure, although the report did recommend an increase of two levels from the base offense level because Burns failed to report income exceeding $10,000. (J.A. 15). The report made no finding whatever of any disruption of a governmental function at AID. The only discussion of government operations in the report was:

> Mr. Burns . . . would issue a false claim (Form 1034) in the name of Vincent Kaufman. . . . The false form was prepared by a clerk and subsequently approved by the defendant. The voucher would then be sent to the U.S. Treasury Department for payment to Vincent Kaufman. The payment checks were then sent directly to the account of Vincent Kaufman . . . . The Government has determined that 53 fraudulent checks were issued and the total amount of the theft was $1,261,184.92.

(J.A. 13).

upon which departure was based, it certainly did not alert the parties that the judge was considering departure; if anything, it dispelled any notion that departure would be considered.

Second, the court of appeals' conclusion that Burns had an opportunity to address the district judge prior to sentencing underestimates the significance of the fact that Burns was unable to address the specific factors that formed the basis for the upward departure. The court of appeals failed to recognize that an attorney will be unlikely to address technical arguments regarding the propriety of departure unless notified that the judge is considering departure. As the Second Circuit stated in *United States v. Kim*:

> Though counsel always can be expected to urge leniency in addressing a district judge at sentencing, under the Guidelines system his argument will normally be cast quite differently depending on whether the judge has indicated that an upward departure is contemplated. Without such indication, counsel will focus on those aspects of the case that merit leniency, arguing for a sentence at the low end of the applicable guideline range, or, if unusual mitigating factors are present, urging a downward departure. Faced with the prospect of an upward departure, however, counsel must focus on the technical issues of whether an upward departure is permissible under the statutory standard, whether a departure, if made, will be pursuant to part 4A or part 5K of the Guidelines, and whether anything in the Guidelines precludes such a departure . . . . Counsel will also be concerned with appealing more generally to the judge's discretion not to make an upward departure or to make at most only a slight departure.

896 F.2d 678, 681 (2d Cir. 1990) (citations omitted). Burns' complaint is not, as the court of appeals below stated, just a lost chance to make a stronger argument, (J.A. 85), although even that finding itself suggests that Burns was prejudiced by the lack of notice. Rather, as the Second Circuit recognized in *Kim*, the opportunity to address the court in a meaningful manner can only take place if there is notice that the court is considering an upward departure. Without that notice, defense counsel's argument to the court was the predictable call for leniency with no discussion of the critical and technical issues relevant to upward departure. (J.A. 40-45).[20]

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[20] For example, arguments that almost certainly would have been presented to the sentencing court if notice had been given include: 1) a departure for concealment was unwarranted because the tax evasion offense provided for a two level increase if the defendant failed to report income exceeding $10,000 in any year derived from criminal activity, U.S.S.G. § 2T1.1(b)(1); 2) the duration of the offense was not sufficiently unusual to warrant departure because the Guidelines contemplate conduct extending over prolonged periods and provide for level adjustment for "more than minimal planning," U.S.S.G. §§ 2B1.1(b)(4), 2F1.1(b)(2)(A), 1B1.1, note 1(f); 3) the offense did not cause a significant disruption of any governmental function because the money was taken from an unused travel fund and there was no evidence that any governmental operation was affected, much less significantly disrupted, by the thefts; 4) even if some departure was appropriate, it should have been minimal because the departure factors at issue are not substantial oversights and severe departure does not comply with the purposes of punishment endorsed by Congress and the Sentencing Commission, 18 U.S.C. § 3553(a) (1988);

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Finally, Burns' right to appeal his sentence does not remedy the district court's failure to allow defense counsel to comment upon the upward departure prior to sentencing. It is true that Burns raised on appeal the arguments he claims should have been made in the district court. The two fora, however, are quite different – the district court imposed sentence, and the appeals court reviewed that decision. An appellate court may only vacate a decision to depart from the Guidelines if it determines that the departure is "unreasonable." 18 U.S.C. § 3742(f)(2) (1988). Although review may proceed slightly differently in any given circuit,[21] the majority

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and 5) any doubt about departure should be resolved in Burns' favor because departures should not be routine and "judicially-created" departures should be "highly unusual." U.S.S.G., ch. 1, pt. A.4(b). The district judge here may have been unaware of the unusual nature of departures because she indicated that she had departed from the Guidelines "many" times. (J.A. 62).

[21] Some variation exists in the language and structure of analysis used by the courts of appeal to review upward departure. Generally, the analysis focuses on whether: 1) the grounds for departure were permissible; 2) sufficient facts underlie permissible grounds; and 3) the amount of the departure was reasonable. *See, e.g., United States v. Shuman*, 902 F.2d 873, 875-76 (11th Cir. 1990); *United States v. Lang*, 898 F.2d 1378, 1379-80 (8th Cir. 1990); *United States v. Lira-Barraza*, 897 F.2d 981, 983 (9th Cir. 1990); *United States v. White*, 893 F.2d 276, 277-78 (10th Cir. 1990); *United States v. Joan*, 883 F.2d 491, 494 (6th Cir. 1989); *United States v. Daughtrey*, 874 F.2d 213, 218 (4th Cir. 1989); *United States v. Miller*, 874 F.2d 466, 471 (7th Cir. 1989); *United States v. Diaz-Villafane*, 874 F.2d 43, 49 (1st Cir.), *cert. denied*, 110 S. Ct. 177 (1989); *United States v. Mejia-Orosco*, 867 F.2d 216, 221 (5th Cir.), *cert. denied*, 109 S. Ct. 3257 (1989); *United States v. Uca*, 867 F.2d 783, 786 (3d Cir. 1989); *United States v. Correa-Vargas*, 860 F.2d 35, 36-37 (2d Cir. 1988).

view is that the reasonableness standard involves a high degree of deference to the trial court.[22] The court of appeals below conducted plenary review to determine whether a factor was "adequately considered" by the Sentencing Commission. (J.A. 78). Once the court determined that a factor was a "legally permissible basis for departure," the court gave broad deference to the district court's determination that departure was "appropriate," *id.*; the degree of departure was reviewed only to see if the sentence was "arbitrary and capricious." (J.A. 83). That Burns was unable to convince the court of appeals that the departure was unreasonable is no gauge of whether these same arguments might have persuaded the sentencing court to exercise its discretion in a more favorable manner.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed, and the case should be

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[22] *See United States v. McCrary*, 887 F.2d 485, 488 (4th Cir. 1989) (where a departure decision is challenged essentially on factual grounds, review "necessarily takes on the quality of the 'clearly erroneous' standard"); *Joan*, 883 F.2d at 496 ("Necessarily, the trial judge's determination must be given great deference, and, unless there is little or no basis for the trial court's action in departing, it must be upheld . . . . "); *Diaz-Villafane*, 874 F.2d at 50 (the court of appeals will not lightly disturb decisions to depart or related decisions implicating degrees of departure); *Correa-Vargas*, 860 F.2d at 40 (allowing district courts "sensible flexibility" in exercising their sound judgment to depart from Guidelines).

remanded for resentencing in conformity with Rule 32(a)(1) and procedural due process.

Respectfully submitted,

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APPENDIX

U.S. Const. amend. V

"No person shall . . . be deprived of life, liberty, or property, without due process of law"

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18 U.S.C. § 3553 (1988)

Imposition of a sentence

(a) Factors to be considered in imposing a sentence. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care,

or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence. – The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official

commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(c) Statement of reasons for imposing a sentence. – The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence –

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described.

* * *

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18 U.S.C. § 3742 (1988)

Review of a sentence

(a) Appeal by a defendant. – A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence –

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) Appeal by the Government. – The Government, with the personal approval of the Attorney General or Solicitor General, may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence –

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

* * *

(e) Consideration. – Upon review of the record, the court of appeals shall determine whether the sentence –

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside of the applicable guideline range, and is unreasonable, having regard for –

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guidelines and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

(f) Decision and disposition. – If the court of appeals determines that the sentence –

* * *

(2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and –

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

* * *

Federal Rules of Criminal Procedure – Rule 32 (1982)

Sentence and Judgment

(a) Sentence.

(1) Imposition of Sentence. Sentence shall be imposed without unreasonable delay. Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment. The attorney for the government shall have an equivalent opportunity to speak to the court.

* * *

Federal Rules Of Criminal Procedure – Rule 32 (1988)

Sentence and Judgment

(a) Sentence.

(1) Imposition of Sentence. Sentence shall be imposed without unnecessary delay, but the court may, when there is a factor important to the sentencing determination that is not then capable of being resolved, postpone the imposition of sentence for a reasonable time until the factor is capable of being resolved. Prior to the sentencing hearing, the court shall provide the counsel for the defendant and the

attorney for the Government with notice of the probation officer's determination, pursuant to the provisions of subdivision (c)(2)(B), of the sentencing classifications and sentencing guideline range believed to be applicable to the case. At the sentencing hearing, the court shall afford the counsel for the defendant and the attorney for the Government an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence. Before imposing sentence, the court shall also –

(A) determine that the defendant and defendant's counsel have had the opportunity to read and discuss the presentence investigation report made available pursuant to subdivision (c)(3)(A) or summary thereof made available pursuant to subdivision (c)(3)(B);

(B) afford counsel for the defendant an opportunity to speak on behalf of the defendant; and

(C) address the defendant personally and determine if the defendant wishes to make a statement and to present any information in mitigation of the sentence.

The attorney for the Government shall have an equivalent opportunity to speak to the court. Upon a motion that is jointly filed by the defendant and by the attorney for the Government, the court may hear in camera such a statement by the defendant, counsel for the defendant, or the attorney for the Government.

(2) Notification of Right to Appeal. After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal, including any right to appeal the sentence, and of the right of a person who in [sic] unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere, except that the court shall advise the defendant of any right to appeal the sentence. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

(b) Judgment.

(1) In General. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(2) Criminal Forfeiture. When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper.

(c) Presentence Investigation.

(1) When Made. A probation officer shall make a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. 3553, and the court explains this finding on the record.

Except with the written consent of the defendant, the report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty.

(2) **Report.** The report of the presentence investigation shall contain –

(A) information about the history and characteristics of the defendant, including prior criminal record, if any, financial condition, and any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant.

(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission pursuant to section 994(a) of title 28, that the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1); and an

explanation by the probation officer of any factors that may indicate that a sentence of a different kind or of a different length from one within the applicable guideline would be more appropriate under all the circumstances;

(C) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2);

(D) verified information stated in a non-argumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed;

(E) unless the court orders otherwise, information concerning the nature and extent of non-prison programs and resources available for the defendant; and

(F) such other information as may be required by the court.

(3) Disclosure.

(A) At least 10 days before imposing sentence, unless this minimum period is waived by the defendant, the court shall provide the defendant and the defendant's counsel with a copy of the report of the presentence investigation, including the information required by subdivision (c)(2) but not including any final recommendation as to sentence, and not to the extent that in the opinion of the court the report contains diagnostic opinions, which if disclosed, might

seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. The court shall afford the defendant and the defendant's counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it.

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant and the defendant's counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

(C) Any material which may be disclosed to the defendant and the defendant's counsel shall be disclosed to the attorney for the government.

(D) If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part

thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons.

* * *

SENTENCING GUIDELINES

CHAPTER ONE – INTRODUCTION AND GENERAL APPLICATION PRINCIPLES

PART A – INTRODUCTION

* * *

3. The Basic Approach (Policy Statement)

* * *

Second, Congress sought uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity.

* * *

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4. **The Guidelines' Resolution of Major Issues (Policy Statement)**

* * *

(b) Departures.

* * *

The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly unusual.

* * *

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§1B1.1. Application Instructions

* * *

Commentary

Application Notes:

1. *The following are definitions of terms that are used frequently in the guidelines:*

* * *

(f) "More than minimal planning" means more planning than is typical for commission of the offense in a simple form. "More than minimal planning" also exists if significant affirmative steps were taken to conceal the offense.

"More than minimal planning" is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune. Consequently, this adjustment will apply especially frequently in property offenses.

* * *

In an embezzlement, a single taking accomplished by a false book entry would constitute only minimal planning. On the other hand, creating purchase orders to, and invoices from, a dummy corporation for merchandise that was never delivered would constitute more than minimal planning, as would several instances of taking money, each accompanied by false entries.

* * *

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§2B1.1. Larceny, Embezzlement, and Other Forms of Theft

* * *

(b) Specific Offense Characteristics

* * *

(4) If the offense involved more than minimal planning, increase by 2 levels.

* * *

Commentary

* * *

Background:

* * *

The guidelines provide an enhancement for more than minimal planning, which includes most offense behavior involving affirmative acts on multiple occasions. Planning and repeated acts are indicative of an intention and potential to do considerable harm. Also, planning is often related to increased difficulties of detection and proof.

* * *

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§2F1.1. Fraud and Deceit

* * *

(b) Specific Offense Characteristics

* * *

(2) If the offense involved (A) more than minimal planning, or (B) a scheme to defraud more than one victim, increase by 2 levels.

* * *

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§2T1.1. Tax Evasion

* * *

(b) Specific Offense Characteristics

(1) If the defendant failed to report or to correctly identify the source of income exceeding $10,000 in any year from criminal activity, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

* * *

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§4A1.3. Adequacy of Criminal History Category (Policy Statement)

If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range.

* * *

A departure under this provision is warranted when the criminal history category significantly under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes.

* * *

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§5K2.0. Grounds for Departure (Policy Statement)

Under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the court at the time of sentencing. Nonetheless, the present section seeks to aid the court by identifying some of the factors that the Commission has not been able to fully take into account in formulating precise guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing judge. Similarly, the court may depart from the guidelines, even though the reason for departure is listed elsewhere in the guidelines (*e.g.*, as an adjustment or specific offense characteristic), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.

Where the applicable guidelines, specific offense characteristics, and adjustments do take into consideration a factor listed in this part, departure from the guideline is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense of conviction. Thus, disruption of a governmental function, §5K2.7, would have to be quite serious to warrant departure from the guidelines when the offense of conviction is bribery or obstruction of justice. When the offense of conviction is theft, however, and when the theft caused disruption of a governmental function, departure from the applicable guideline more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the offense of conviction is robbery because the robbery guideline includes a specific sentence adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing. For example, the use of a

weapon has been listed as a specific offense characteristic under many guidelines, but not under immigration violations. Therefore, if a weapon is a relevant factor to sentencing for an immigration violation, the court may depart for this reason.

Harms identified as a possible basis for departure from the guidelines should be taken into account only when they are relevant to the offense of conviction, within the limitations set forth in §1B1.3.

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§6A1.3. Resolution of Disputed Factors *

(a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at

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* Ed. – Effective November 1, 1989, §6A1.3 was designated as a policy statement. *See* United States Sentencing Commission, *Guidelines Manual*, Appendix C, amendment 294 (West 1990).

trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

(b) The court shall resolve disputed sentencing factors in accordance with Rule 32(a)(1). Fed. R. Crim. P. (effective Nov. 1, 1987), notify the parties of its tentative findings and provide a reasonable opportunity for the submission of oral or written objections before imposition of sentence.

Commentary

In current practice, factors relevant to sentencing are often determined in an informal fashion. The informality is to some extent explained by the fact that particular offense and offender characteristics rarely have a highly specific or required sentencing consequence. This situation will no longer exist under sentencing guidelines. The court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair. Although lengthy sentencing hearings should seldom be necessary, disputes about sentencing factors must be resolved with care. When a reasonable dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. See United States v. Fatico, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979). The sentencing court must

determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.

In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. 18 U.S.C. § 3661. Any information may be considered, so long as it has "sufficient indicia of reliability to support its probable accuracy." United States v. Marshall, 519 F.Supp. 751 (D.C. Wis. 1981), aff'd, 719 F.2d 887 (7th Cir. 1983); United States v. Fatico, 579 F.2d 707 (2d Cir. 1978). Reliable hearsay evidence may be considered. Out-of-court declarations by an unidentified informant may be considered "where there is good cause for the nondisclosure of his identity and there is sufficient corroboration by other means." United States v. Fatico, 579 F.2d at 713. Unreliable allegations shall not be considered. United States v. Weston, 448 F.2d 626 (9th Cir. 1971).

If sentencing factors are the subject of reasonable dispute, the court should, where appropriate, notify the parties of its tentative findings and afford an opportunity for correction of oversight or error before sentence is imposed.

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(8)

No. 89-7260

In the Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM J. BURNS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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33 pp

QUESTION PRESENTED

Whether a district court is required to notify the defendant in advance of its intent to depart upward from the range of sentences prescribed by the Sentencing Guidelines, and of the grounds for the departure.

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals, J.A. 74-87, is reported at 893 F.2d 1343.

JURISDICTION

The judgment of the court of appeals, J.A. 88, was entered on January 12, 1990. A petition for rehearing was denied on March 15, 1990. J.A. 89. The petition for a writ of certiorari was filed on April 19, 1990, and was granted on June 28, 1990. J.A. 91. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Following his guilty plea in the United States District Court for the District of Columbia, petitioner was convicted of theft of government funds, in violation of 18 U.S.C. 641; making false claims against the government, in violation of 18 U.S.C. 287; and attempting to evade the payment of income taxes, in violation of 26 U.S.C. 7201. Petitioner was sentenced to 60 months' imprisonment, to be followed by a three-year term of supervised release. J.A. 67, 74. The court of appeals affirmed. J.A. 74-87.

1. Between 1982 and 1988, petitioner used his position as a supervisor in the Financial Management Section of the Agency for International Development (AID) to divert funds from an unused travel account to a bank account in the name of Vincent Kaufman. Petitioner approved disbursements from the fund for the purported purpose of paying "Kaufman" to move furniture for AID. In reality, "Kaufman" did not exist, no work was performed, and petitioner controlled the bank account into which the funds were deposited. Before the scheme was discovered, petitioner embezzled a total of more than $1.2 million. Because petitioner failed to report the stolen funds on his income tax returns, he underpaid his federal income taxes by $475,685. J.A. 13-14, 75.

Petitioner pleaded guilty pursuant to an agreement that stated the parties' understanding that his sentence would be governed by the Sentencing Guidelines, that his offense level would be 19, and that his criminal history category would be I. J.A. 5. The presentence report prepared by the Probation Office agreed with the parties' calculation, and stated that the Guideline sentence for that offense level and criminal history category would be 30 to 37 months' imprisonment. J.A. 15-16. The presentence report also set forth the probation officer's opinion that "[t]here are no factors that would warrant departure from the guideline sentence." J.A. 21.

Both parties acknowledged the factual accuracy of the presentence report. J.A. 32-33, 36. At the sentencing hearing, petitioner's counsel—apparently recognizing the possibility of an upward departure—urged the district court to "consider a sentence within the guidelines." J.A. 45.[1] The prosecutor made no specific sentencing recommendation, but asked the district court to impose a sentence that reflected that petitioner's embezzlement was "one of the largest single thefts of public funds committed in the history of the [A]merican criminal law." J.A. 47.

After hearing the parties' comments on the appropriate sentence for petitioner's crime, the district court sentenced petitioner to 60 months' imprisonment. J.A. 55. The court departed upward from the Guidelines range because petitioner's offense was of unusual duration, because petitioner had abused the process on which the government relied to pay legitimate vendors, and because petitioner's income tax evasion had served to conceal his theft of government funds. J.A. 52-55; see J.A. 65, 70-73.

Petitioner did not object to the district court's upward departure from the Guidelines range, nor did he object that the grounds of departure came as a

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[1] The court had warned petitioner before accepting his guilty plea that it had "the authority in some circumstances to impose a sentence that is more severe or less severe than the sentence called for by the guidelines." 8/11/88 Tr. 14. The court also cautioned petitioner that he could be sentenced to up to 20 years in prison. *Id.* at 15.

surprise. Moreover, counsel did not object to the fact or basis of the district court's upward departure. He did object at length, however, to the district court's order directing that petitioner be taken into custody immediately and not accorded the privilege of voluntary surrender. J.A. 57-62.

2. The court of appeals held that the district court's grounds for departing upward from the Guidelines range were proper and that the sentence imposed was reasonable. J.A. 78-83.[2] The court of appeals further held that the district court was not required to notify petitioner in advance that it might depart from the Guidelines range or state beforehand its reasons for considering an upward departure. J.A. 83-85. The court noted that "[p]re-Guidelines sentencing procedures never called for such notice of the judge's intention to deviate from a plea bargain or a probation officer's recommendation," and it found nothing in the Guidelines or in Rule 32 of the Federal Rules of Criminal Procedure that changed that practice. J.A. 84.

The court of appeals also found that petitioner was not harmed by the lack of notice. The court noted that petitioner had an opportunity to address the district court and challenge the factual basis for the upward departure prior to sentencing, and he had an opportunity to test the legal basis for the departure in the court of appeals. The court explained: "All of the facts that formed the basis of

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[2] Although petitioner mentions the arguments rejected by the court of appeals as ones that "almost certainly would have been presented to the sentencing court if notice had been given," Pet. Br. 31 n.20, petitioner does not renew his contention that the district court's upward departure was not "reasonable" under the Guidelines, 18 U.S.C. 3742(e).

[the district court's] decision were contained in the presentencing report, and [petitioner] could have challenged the factual findings if he had believed that they were erroneous"; "[his] right to appeal preserves his ability to challenge the *legal* ground on which the departure decision rests." J.A. 84-85 (emphasis in original).

SUMMARY OF ARGUMENT

A. The Due Process Clause does not require that a defendant be given advance notice of a district court's intention to depart from the sentencing range prescribed by the Sentencing Guidelines. Trial courts have traditionally imposed sentence without observing the procedural formalities applicable to criminal trials, and this Court has consistently upheld that practice against due process challenges. The sentencing court's discretionary authority to depart from the Sentencing Guidelines range without advance notice to the defendant falls comfortably within the tradition of sentencing discretion historically exercised by trial judges and held to satisfy due process.

In light of the well-settled practice of conducting sentencing proceedings without the kind of "notice and comment" procedure that petitioner seeks, the Court need not conduct a detailed "cost-benefit" analysis under *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), to determine whether such a procedure is required by the Due Process Clause. Even under *Eldridge*, the balance of interests does not require a court to give advance notice of a possible departure from the Guidelines sentencing range. Existing procedures already go far to protect against sentencing based on inaccurate information. A constitutional requirement of advance notice of the possibility and

grounds for a departure could impose a substantial burden on federal district courts and would not significantly improve the accuracy of sentencing proceedings. Moreover, the principle underlying such a notice requirement—that a defendant has a constitutional right of allocution that is meaningful only if he knows the expected sentence and the reasons for it—would render "fundamentally unfair" sentencing hearings as they are now conducted and have long been conducted in the vast majority of state courts. Before requiring a wholesale revision in the way sentencing is conducted in this country, the Court should insist that the proposed procedure be of far greater importance to the fair conduct of sentencing proceedings than the "notice and comment" procedure that petitioner asks this Court to adopt.

B. In the Sentencing Reform Act of 1984, Congress established a detailed procedure for imposing sentence. That procedure includes a requirement that a defendant have "an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence." It does not, however, require advance notice that the district court may depart from the Guidelines sentencing range and the reasons for that departure. In light of the detailed and comprehensive provisions of the federal law governing sentencing proceedings, the omission of any requirement of advance notice of a district court's intention to depart from the Sentencing Guidelines is quite telling. Congress clearly intended to create a complete set of written rules for sentencing proceedings that would guarantee fair proceedings and yet be unmistakably clear and easy to follow. It did not intend the rule it created to serve simply as a skeleton around which the courts

would fashion other rules designed to improve upon the system Congress prescribed. Notice of the kind proposed by petitioner may or may not be a good idea; but if it is to be adopted, it should be done through the rulemaking process, not through case law development.

ARGUMENT

A DISTRICT COURT IS NOT REQUIRED TO GIVE ADVANCE NOTICE THAT IT MAY DEPART FROM THE RANGE OF SENTENCES PRESCRIBED BY THE SENTENCING GUIDELINES

A. The Due Process Clause Does Not Require A District Court To Give Advance Notice Of A Prospective Departure Decision

It is well settled that the Due Process Clause does not require state and federal judges imposing sentence to observe the procedural formalities applicable to criminal trials or agency adjudications. As this Court explained in *Williams* v. *Oklahoma*, 358 U.S. 576 (1959):

> once the guilt of the accused has been properly established, the sentencing judge, in determining the kind and extent of punishment to be imposed, is not restricted to evidence derived from the examination and cross-examination of witnesses in open court but may, consistently with the Due Process Clause of the Fourteenth Amendment, consider responsible unsworn or "out-of-court" information relative to the circumstances of the crime and to the convicted person's life and characteristics.

Id. at 584; accord *United States* v. *Grayson*, 438 U.S. 41, 50 (1978); *United States* v. *Tucker*, 404 U.S. 443, 446 (1972). The evaluation of such evidence is not governed by the "beyond a reasonable doubt"

standard applicable to criminal trials, or even by the "clear and convincing evidence" standard; to the contrary, "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all." *McMillan* v. *Pennsylvania*, 477 U.S. 79, 91 (1986).

In *Williams* v. *New York*, 337 U.S. 241 (1949), this Court upheld a death sentence imposed by a state trial judge over the jury's recommendation of mercy; the judge's contrary decision rested in part on hearsay information in a presentence report. The defendant argued that the admission of that information violated his due process right to be "given reasonable notice" and "an opportunity to examine adverse witnesses." *Id.* at 243, 245. This Court rejected defendant's challenge and held that "the Due Process Clause did not require a State to choose between prohibiting the use of such reports and holding an adversary hearing." *McGautha* v. *California*, 402 U.S. 183, 218 n.22 (1971).[3] In *Specht* v. *Patterson*, 386 U.S. 605, 606 (1967), this Court characterized *Williams* broadly as holding that the Due Process Clause does "not require a judge to have hearings and to give a convicted person an opportunity to participate in those hearings when he [comes] to determine the sentence to be imposed."

In light of the traditional authority of state and federal trial judges to impose sentence in criminal cases without any fixed procedures, petitioner bears a heavy burden in arguing, see Pet. Br. 21-27, that

[3] Although *Williams* v. *New York* remains good law in non-capital cases, its holding as applied to capital cases was qualified by *Gardner* v. *Florida*, 430 U.S. 349, 357 (1977) (plurality opinion).

imposing a lawful sentence is "fundamentally unfair" in the absence of prior notice of both the court's inclination to impose that sentence and the reasons for doing so. As the court of appeals observed, petitioner's suggestion "would constitute a radical deviation from past practice and would impose a cumbersome burden on trial judges." J.A. 84. Because such " 'traditional ways of conducting government . . . give meaning' to the Constitution," *Mistretta* v. *United States*, 109 S. Ct. 647, 669 (1989) (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)), this Court should not lightly assume their constitutional deficiency. See *Schick* v. *Reed*, 419 U.S. 256, 266 (1974) (" 'If a thing has been practised for two hundred years by common consent, it will need a strong case' to overturn it." (quoting *Jackman* v. *Rosenbaum Co.*, 260 U.S. 22, 31 (1922) (Holmes, J.)); *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961) (due process is "compounded of history, reason, [and] the past course of decisions").[4] We are not aware of a single State that has adopted the kind of notice requirement that petitioner proposes, and, as petitioner acknowledges,

[4] See also *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276-277 (1856) ("To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common law and statue law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."); *id.* at 279-280.

Pet. Br. 14, Congress has not expressly adopted that requirement either.

2. Congress's enactment of a guidelines sentencing system does not change the due process calculus. The principal change wrought by the Sentencing Guidelines is that the presence or absence of particular facts now has an objectively measurable effect on a defendant's sentence, while under the prior system it did not. But the fact that the sentencing process has been made more rational and predictable does not mean that the Constitution now requires more procedural protections than it did in the past. At the time it created the Guidelines system, Congress amended Federal Rule of Criminal Procedure 32 to institute an elaborate system of procedural protections for the sentencing process. Those protections went far beyond what any Rule, statute, or court decision had previously mandated, but they did not include the "prior notice and explanation" requirement that petitioner advocates. Petitioner's position is that in spite of the many protections afforded by Rule 32, sentencing proceedings are nonetheless constitutionally invalid if the district court fails to notify a defendant of its intention to impose a sentence outside the Guideline range and its reasons doing so. Yet that challenge is no different in principle from one directed to an unexpectedly harsh but legal sentence imposed by a district court before the Guidelines took effect, or to such a sentence if imposed by the vast majority of state trial judges today. It should therefore fare no better under this Court's precedents than previous challenges to trial courts' wide leeway to select the procedures they will follow in sentencing criminal defendants.

3. Petitioner relies on the balancing test for due process analysis set forth in *Mathews* v. *Eldridge*,

424 U.S. 319, 335 (1976), but that test does not dictate a different result. In *Eldridge*, the Court held that to identify the specific dictates of due process in particular settings, it is ordinarily necessary to consider three factors: (1) the private interest affected by governmental action; (2) the risk of an erroneous deprivation of that interest through the procedures used, and the probable value of additional or substitute procedures; and (3) the burden on the government of the proposed procedures. *Ibid.*

In the realm of sentencing, this Court has already concluded that due process is satisfied by holding a hearing at which the defendant is permitted to present his case. This Court has never suggested that a sentencing court must give the parties notice of the proposed sentencing decision or the reasons for it.

In *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), the Court declined to engage in a detailed balancing of the costs and benefits of a proposed requirement of "written notice of the precise time of the [parole] hearing reasonably in advance of the hearing, setting forth the factors which may be considered by the Board in reaching its decision." *Id.* at 6. Nebraska provided notice of the hearing date but not of the Board's intentions regarding the inmate's parole or the reasons for its proposed decision. *Id.* at 14 n.6. The Court explained that Nebraska's parole statute resembled a "sentencing judge's choice * * * to grant or deny probation following a judgment of guilt, a choice never thought to require more than what Nebraska now provides for the parole-release determinations." *Id.* at 16. Accordingly, the Court rejected the proposed notice requirement. *Id.* at 14 n.6; see *Bowles* v. *Tennant*, 613 F.2d 776, 779 (9th Cir. 1980) (applying *Greenholtz* to federal parole statute

and holding that due process does not require "advance notice of the factors that may be considered at the parole hearing"). As the Court's reference to the sentencing analogy suggests, if prior notice of a decisionmaker's tentative decision and reasons concerning the length of incarceration is not required in the administrative parole context, there is no reason to suppose it should be required in the case of sentencing by state and federal judges.

Even if it is necessary for the Court to apply the three-part balancing formula from *Eldridge*, the case for petitioner's proposed procedure is still not made out. In applying *Eldridge* it is important to keep in mind that the object of the inquiry is not to determine whether a proposed procedural safeguard is a "good idea," but to ascertain whether its absence renders the existing procedure fundamentally unfair. Even when analyzed under the *Eldridge* test, the absence of petitioner's procedure does not have that effect. While convicted defendants obviously have a great interest in the amount of time they will spend in prison, a sentencing decision of the sort at issue in this case is not likely to be affected significantly by the procedure petitioner proposes. Current procedures ensure that the district court has a sound factual basis for departing from the Guidelines range and that the departure is reasonable. The district court must "state in open court the reasons for its imposition of the particular sentence" and in particular must state "the specific reason for the imposition of a sentence" that is outside the Guidelines range. 18 U.S.C. 3553(c). A sentence that is outside the Guidelines is reviewable if the departure, in light of the district court's statement of reasons, was legally impermissible or otherwise unreasonable. 18 U.S.C. 3742.

Petitioner responds that prior notice of a court's intention to depart would alert defense counsel to "appeal[] more generally to the judge's discretion not to make an upward departure or to make at most only a slight departure." Pet. Br. 30-31 (quoting *United States* v. *Kim*, 896 F.2d 678, 681 (2d Cir. 1990)). But that is precisely what petitioner's trial counsel did in his extended plea in mitigation, see J.A. 40-45, which concluded by "ask[ing] [the district court] to consider a sentence within the guidelines." J.A. 45. For that matter, it is what any competent trial counsel would do. Advance notice that the court may depart from the Guidelines sentencing range—which the law clearly entitles the court to do—would tell defense counsel nothing he did not already know.

If the notice requirement were interpreted to include a pre-hearing statement of the court's reasons for its sentence, as petitioner proposes, see Pet. Br. 26 n.16, 27, it would impose a substantial burden on sentencing judges. Under that kind of notice requirement, a district court would have only two options. One would be to review the presentence report and circulate a proposed sentence and statement of reasons in advance of the sentencing hearing. That option would make the district court reach a tentative but public judgment as to the appropriate sentence before hearing from the parties at the sentencing hearing. Besides requiring the court to make an initial sentencing judgment without the benefit of the parties' evidence and argument, it might make district courts reluctant to modify their initial sentencing judgments based on the parties' presentations at the sentencing hearing. If that happened, the sentencing hearing could end up being a procedurally elaborate, but substantively pointless exercise.

A second option would be to conduct sentencing hearings as they are conducted at present, and to order a recess in the event the court finds it proper to depart from the Guidelines sentencing range. But to require a second sentencing hearing in any case in which a departure is contemplated would greatly burden the district courts. The Sentencing Commission estimates that departures from the Guidelines range occur in approximately 12.2% of all cases. United States Sentencing Comm'n, *Annual Report* 47 (1989). Presumably, district courts consider the possibility of departure in many more cases than that. Since federal district courts sentence more than 40,000 defendants each year,[5] it would be very burdensome to require multiple sentencing hearings in a significant percentage of those cases. The court of appeals was therefore correct in concluding that, under either scenario, petitioner's notice proposal would impose a "cumbersome burden on trial judges." J.A. 84.[6]

Moreover, because there is no principled way to limit a due process notice obligation to departure decisions under the federal Sentencing Guidelines, it is likely that the eventual costs of adopting the prin-

[5] A total of 44,524 defendants were convicted and sentenced in federal district courts during the year ending June 30, 1989. *Annual Report of the Director of the Administrative Office of the United States Courts* 279 (1989).

[6] Of course, if the notice requirement were interpreted to require only that the district court announce its decision to depart at some point during the sentencing hearing, without the need to conduct a second hearing at a different time, the costs of the notice requirement would be minimal (although it would still create a trap for the unwary district judge who does not remember to issue such a solicitation of objections). But the benefits of such on-the-spot notice to defense counsel would be correspondingly small.

ciple petitioner advocates will be much higher. If departure notice is required as a matter of "fundamental fairness," it must be because a defendant has a right to allocution[7] that can be meaningfully exercised only if the defendant knows the judge's tentative sentencing decision and the reasons for it. That analysis, however, would cast constitutional doubts over sentencing proceedings as they are now conducted in the vast majority of state courts, which do not use a guideline system of sentencing. Before embarking on a course that would require such a dramatic departure from the Court's prior precedents regarding sentencing and would have such a profound impact on sentencing proceedings in the state court systems, this Court should require a very strong showing that the procedure that petitioner advocates is essential to achieve fairness in sentencing. Petitioner has not pointed to any unfairness in this case or any pattern of unfairness in general that would justify a constitutional change of that magnitude.

Finally, in considering the constitutional status of the procedure petitioner proposes, it is important to note how unusual that procedure would be. Petitioner is in effect asking for a constitutional rule requiring a "notice and comment" procedure before a departure sentence is imposed. But while notice and comment procedures are sometimes required by statute, we know of no case in which this Court has imposed such a requirement as a constitutional matter. To the contrary, most legal proceedings are conducted

[7] This Court has never decided the question whether "due process of law requires that a criminal defendant wishing to present evidence or argument presumably relevant to the issues involved in sentencing should be permitted to do so." *McGautha* v. *California*, 402 U.S. at 218.

without any such procedure. For example, a district court conducting a bench trial is not required to give advance notice of its intention to find a defendant guilty and to give the reasons for that finding before entering it so that the defendant can attempt to dissuade the court from ruling that way. See Fed. R. Crim. P. 23(c). Nor is a court required to submit tentative findings to the parties for their comments before entering a judgment in a non-jury civil case, even if the theory on which the court bases its ruling differs from the theories advanced by the parties. See Fed. R. Civ. P. 52. If due process does not require an opportunity for comment on the court's tentative judgment in those cases, it is difficult to understand why the same Due Process Clause requires that kind of opportunity in the context of criminal sentencing.

B. The Sentencing Reform Act Does Not Require Advance Notice Of A District Court's Departure Decision

1. As part of the Sentencing Reform Act of 1984, Congress amended Federal Rule of Criminal Procedure 32, which governs sentencing proceedings in federal courts. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, § 215, 98 Stat. 2014-2015. In the same Act, § 212(a)(2), 98 Stat. 1987-2001, Congress revised Chapter 227 of Title 18 and prescribed the procedures to be followed with respect to presentence reports, 18 U.S.C. 3552, the imposition of sentence, 18 U.S.C. 3553, and a variety of other matters.

Rule 32 and Chapter 227 set forth in great detail the procedures that a district court must follow in imposing sentence. The probation officer must conduct a presentence investigation and prepare a report. The report must contain various elements, including "an explanation by the probation officer of

any factors that may indicate that a sentence of a different kind or of a different length than one within the applicable guideline would be more appropriate under all the circumstances." Fed. R. Crim. P. 32(c)(2)(B). In addition, the district court must provide the parties "with notice of the probation officer's determination * * * of the sentencing classifications and the sentencing guideline range believed to be applicable to the case." Fed. R. Crim. P. 32(a)(1). The presentence investigation report must be provided to the defendant and his counsel at least ten days before the sentencing hearing, unless the defendant waives that minimum period. 18 U.S.C. 3552(d); Fed. R. Crim. P. 32(c)(3).

At the sentencing hearing, the district court must "afford the counsel for the defendant and the attorney for the Government an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence." Fed. R. Crim. P. 32(a)(1). Before imposing sentence, the district court must verify that the defendant and his counsel have had the opportunity to read and discuss the presentence report, and the court must afford the defendant and counsel an opportunity to address the court "and to present any information in mitigation of sentence." Fed. R. Crim. P. 32(a)(1)(A)(B) and (C).

After the district court resolves disputed issues of fact under the procedures set forth in Rule 32, the court must impose a sentence within the presumptively applicable range set by the Sentencing Guidelines, unless it finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18

U.S.C. 3553(b). At the time of sentencing, the court must "state in open court the reasons for its imposition of the particular sentence, and, if the sentence * * * is outside the range * * * the specific reason for the imposition of a sentence different from that described." 18 U.S.C. 3553(c).

The degree of detail in Rule 32 and Chapter 227 indicates that the sentencing procedures Congress adopted were not simply a sketchy procedural outline, to be filled in with other requirements as the courts devise them. Instead, Congres created a complete set of rules, compliance with which satisfies all legal requirements for sentencing. In light of the comprehensiveness of the procedural scheme, it is quite telling that Congress did not include in the package of procedures a requirement that the district court notify the parties in advance of the possibility and grounds for a departure from the Guideline sentence.[8] Cf. *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 146-147 (1985) (declining to imply private remedy from ERISA because carefully integrated scheme provided "strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly"); *Milwaukee* v. *Illinois*, 451 U.S. 304, 319 (1981) (enact-

[8] Although petitioner is correct that several courts of appeals have found an implied right to notice of a proposed departure from the guidelines sentence, see Pet. Br. 12-13 n.4, he incorrectly identifies the First Circuit as among those courts that have found such an implied right. The First Circuit rejected a notice challenge for several reasons, the first of which was that a defendant's right to "notice of any facts that will affect his sentence and a meaningful opportunity to respond" is satisfied by the inclusion of those facts in the presentence report, even if the probation officer "wrote in the report that he 'ha[d] not identified any information that might warrant departure from the guidelines.'" *United States* v. *Hernandez*, 896 F.2d 642, 644 (1990).

ment of comprehensive statutory program by Congress "strongly suggests that there is no room for courts to attempt to improve on that program with federal common law").

While Congress failed to include a presentence "notice and comment" requirement of the sort petitioner proposes, it did include several other express notice requirements in the Sentencing Reform Act of 1984. First, it required notice and an opportunity to comment on the presentence investigation report. 18 U.S.C. 3552(d); Fed. R. Crim. P. 32(a)(1) and (c)(3). Second, it required that before ordering a defendant to give notice to the victim of his crime, the court "shall give notice to the defendant and the Government that it is considering imposing such an order." 18 U.S.C. 3553(d). Third, it required that before imposing an order of restitution the court must disclose to the parties the portions of the presentence report pertaining to the matters that the statute makes relevant to the issue of restitution. 18 U.S.C. 3664.

Petitioner recognizes the parallel between notice of the probation officer's report and notice of a proposed departure from the Sentencing Guidelines. Indeed, he contends that his proposal "is no more cumbersome than the formal procedure required when the [presentence investigation] report recommends upward departure." Pet. Br. 27. The critical difference between the two, however, is that Congress expressly required the district court to provide the parties with notice of the probation officer's determination, but it imposed no such requirement of advance notice of possible departure by the court.

The notice given prior to an order to inform victims about the defendant's conviction is even more closely analogous to the kind of notice for which petitioner is contending here. Section 3553(d) requires

that before a court orders a defendant to inform the victims about his conviction, the court must give the defendant notice that it is considering entering such an order. That is precisely the kind of notice that petitioner claims he should have received before the district ~~court~~ imposed sentence in this case.

Because Congress specifically required advance notice where it considered such notice to be appropriate, Congress's failure to require such notice prior to a departure from the Guidelines range is strong evidence that the omission was intentional. See *General Motors Corp.* v. *United States*, 110 S. Ct. 2528, 2532 (1990) (inappropriate to assume a time limitation in a silent statutory provision when "the very next provision of the Act contains just such an express time restraint"); *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

In the Sentencing Reform Act, Congress struck a balance on matters of procedure; it did not envision either casual sentencing hearings or sentencing mini-trials. Some procedures that had not previously been required were imposed by statute and rule; others were omitted or left to the district courts to employ in their discretion in particular cases. See, *e.g.*, 18 U.S.C. 3553(d) ("the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process"); Fed. R. Crim. P. 32(c)(3)(A) ("in the discretion of the court," sentencing court may permit the defense "to introduce testimony or other information relating to any alleged factual inaccuracy contained in [the presentence investigation report]").

From the structure and background of the statute, it is clear that Congress intended to limit the discretion of district courts in the sentencing process, but to do so selectively. The Sentencing Reform Act cannot be understood as an invitation to appellate courts to create additional procedures in order to make the ones Congress enacted work better. As the Senate Report on the 1984 Act explained,

> [t]he sentencing provisions of the reported bill are designed to preserve the concept that the discretion of a sentencing judge has a proper place in sentencing and should not be displaced by the discretion of an appellate court. At the same time, they are intended to afford enough guidance and control of the exercise of that discretion to promote fairness and rationality, and to reduce unwarranted disparity, in sentencing.

S. Rep. No. 225, 98th Cong., 1st Sess. 150 (1983). The Report noted that the availability of a detailed presentence report would ensure that "the defendant and the government have sufficient information concerning the basis for a sentencing decision to enable them to prepare for the sentencing hearing." *Id.* at 74. The Report warned that the district court's statement of reasons should not become a "legal battleground" at the hearing for challenging a sentence within the Guidelines range or for "mak[ing] judges reluctant to sentence outside the guidelines when it is appropriate." *Id.* at 79-80. This commentary makes it clear that Congress did not intend appellate courts to undermine the discretion of sentencing courts when interpreting the procedures Congress required. It is therefore highly unlikely that Congress wanted the appellate courts to do the same thing by imposing procedural burdens that Congress did *not* require.

2. The Sentencing Guidelines do not require advance notice of a district court's intention to depart from the Guidelines range. The commentary to the policy statement in Section 6A1.3 of the Sentencing Guidelines, entitled "Resolution of Disputed Factors (Policy Statement)," states that the resolution of disputes regarding "particular offense and offender characteristics" will necessitate "[m]ore formality" in sentencing hearings "if the sentencing process is to be accurate and fair." United States Sentencing Comm'n, *Guidelines Manual* § 6A1.3, commentary (Nov. 1989). Petitioner contends that the reference to "[m]ore formality" constitutes a "clear direction" from the Sentencing Commission to depart from pre-Guidelines practice and require advance notice of the possibility and bases of departure. Pet. Br. 20-21.

Contrary to petitioner's claim, the quoted language does not support a requirement of advance notice of a court's intention to depart from the Guidelines sentencing range. The Commission's commentary, which uses very general terms, refers to the need for more formality in order to ensure that disputes regarding offense and offender characteristics are resolved correctly. Those factual matters, which must be resolved by empirical evidence, bear on the defendant's offense level and criminal history category; they determine what the appropriate Guidelines range should be. The offense level and criminal history category, however, do not govern the discretionary decision whether a departure is called for in a particular case.

The Sentencing Commission apparently decided to leave the issues in Section 6A1.1 as policy statements rather than Guidelines because the procedural issues there addressed are "more appropriately covered by the Model Local Rule for Guideline Sentencing prepared by the Probation Committee of the Judicial Conference." United States Sentencing Comm'n, *Guidelines Manual* App. C, at C.30 (Nov. 1989). Significantly, the Model Local Rule does not require advance notice of departure decisions, but mentions only that district judges might want to give the parties the opportunity to object before imposing sentence:

> It would appear to be good practice, particularly in the early days of guideline sentencing, to state proposed findings and conclusions, and perhaps to state the proposed sentence, and then to give the parties an opportunity to object before sentence is actually imposed.

Judicial Conference of the United States, Committee on the Administration of the Probation System—Recommended Procedures for Guideline Sentencing and Commentary (1987), *reprinted in* T. Hutchison & D. Yellen, *Federal Sentencing Law and Practice* App. 8, at 438 (Supp. App. 1989 ed.). That tentative suggestion of a "good practice" that district courts might "perhaps" wish to employ hardly rises to the level of a binding command. And even if it did, petitioner had an opportunity in this case to object to the district court's sentence, as shown by his counsel's extended effort to win for him the privilege of voluntary surrender. See J.A. 57-62. Counsel's failure to object to the district court's upward departure from the Guidelines range may have reflected his view that such an objection would have been fruitless, but that is a reflection of the limited value of the right rather than the unavailability of the opportunity.

3. Petitioner contends that notice of the court's intention to depart from the Guidelines sentence is required to make "meaningful" the opportunity provided by Rule 32 to comment on "other matters relating to the appropriate sentence." See Pet. Br. 8,

14-15, 19. Petitioner's argument in essence is that the right to comment implies the right to notice of any matter that may be worth commenting upon. But that is clearly not correct. A right to comment is a right to be heard, not a right to be informed. If Congress had wanted to enhance the defendant's right to information, it would not have done so by reference to a right to "comment," and it surely would have chosen less open-ended language than "other matters relating to the appropriate sentence." [9]

A right to notice of "other matters relating to the appropriate sentence" would be impossible to confine. Petitioner sees that as a virtue. Notice, as he views it, should help reveal the district court's "assessment of the case," Pet. Br. 11, help "focus the discussion at the sentencing hearing," Pet. Br. 16 n.6, and direct the parties to "address the court's

[9] Petitioner argues that the "comment" language added to Rule 32(a)(1) in 1984 must carry with it an implied right to notice of a proposed departure, because otherwise that language would be superfluous in light of the provision already in the Rule guaranteeing a right of allocution by the defendant and his counsel. Pet. Br. 14-15. The "comment" language is not superfluous. It was added to make clear that the defendant was entitled to address any points made in the probation officer's report; the reference to "other matters relating to the appropriate sentence" was added to avoid the possible inference that the right to comment was somehow *limited* to the contents of the probation officer's report. The addition of the express right to comment on the report and other matters was necessary to make clear that the defendant's right to participate in the sentencing hearing extended beyond the general plea for mercy that comprised the right to allocution in traditional practice. See *Green* v. *United States*, 365 U.S. 301, 304 (1961) (plurality opinion) (describing common-law right of allocution).

concerns," Pet, Br. 11. But to adopt petitioner's construction of the right to comment as implying the right to notice, and thus to require advance notice of any matter that may bear on the court's sentencing decision, would guarantee procedural chaos. Extended litigation would be required to flesh out the scope of the notice requirement by determining whether, for example, notice is required before downward departures as well as upward departures,[10] and whether notice is required with respect to the factors influencing the district court's selection of a sentence within the Guidelines range as well as decisions to depart.[11]

Petitioner seeks to address the problem of defining what matters would be subject to the notice requirement by suggesting that notice might be limited to "matter[s] critical to the sentencing process." Pet. Br. 8. That formulation, however, merely shifts the focus of the inquiry to what matters are important enough to merit advance notice. It does nothing to help define the scope of the court-made notice requirement. And even if it did, the courts would still be left to work out, on a case-by-case basis, numerous ancillary issues such as when and how notice must

[10] See *United States* v. *Jagmohan*, No. 90-1045 (2d Cir. July 13, 1990), slip op. 5534-5535 (requiring notice before downward departures).

[11] See *United States* v. *Ford*, 889 F.2d 1570, 1572 & n.3 (6th Cir. 1989) (rejecting defense counsel's argument that Fed. R. Crim. P. 32(a)(1) requires district courts "to give the parties advance notice of and a chance to comment on the judge's interpretation of the facts" and noting that acceptance of defendant's argument would mean the district judge "in all cases would be required to set forth in advance his reasons for imposing a specific sentence within the guideline").

be given. For example, courts would have to fashion rules as to whether notice at the sentencing hearing is sufficient, or whether it must be provided in advance of the hearing in order to be "meaningful," [12] and if so, how far in advance.[13] The specificity of the notice would also be subject to dispute.[14]

To assign the courts the task of fashioning an uncodified body of sentencing rules of the sort petitioner proposes would be entirely inconsistent with the congressional goal of devising a comprehensive set of written rules to govern the sentencing process. The district courts already have plenty to do in attempting to comply with the complex system of Sen-

[12] Compare *United States* v. *Hedberg*, 902 F.2d 1427, 1428 (9th Cir. 1990) (notice is not required prior to sentencing hearing), and *United States* v. *Hernandez*, 896 F.2d at 644 (notice at sentencing hearing complies with rule adopted by other circuits), with Pet. Br. 26 n.16 (suggesting that notice should "[n]ormally" be given "prior to the sentencing hearing," and if notice is given at the hearing, "a postponement may be necessary").

[13] Cf. *United States* v. *Cervantes*, 878 F.2d 50, 56 (2d Cir. 1989) (intimating that the ten-day advance notice requirement applicable to presentence reports would be applicable to notice of departures from the Guidelines range).

[14] Compare *United States* v. *Hernandez*, 896 F.2d at 644 (mention in presentence report of facts on which district court based departure provided sufficient notice), with *United States* v. *Hedberg*, 902 F.2d at 1428-1429 (presentence report must list all factors supporting departure), *United States* v. *Nuno-Para*, 877 F.2d 1409, 1415 (9th Cir. 1989) (notice in presentence report of departure on one factor does not supply notice on unlisted factors), and *United States* v. *Kim*, 896 F.2d 678, 681 (2d Cir. 1990) (notice in persentence report of factor supporting departure insufficient because it did not include reference to defendant's state of mind).

tencing Guidelines promulgated by the Sentencing Commission. Nothing in the Sentencing Reform Act or the Sentencing Guidelines requires that the courts bear the additional burden of creating and shaping a new set of principles governing notice requirements for sentencing proceedings.[15]

It may or may not be a good idea for a district court to provide the parties with notice of the court's intention to depart from a Guidelines sentence. If it is, the proper way for that good idea to become law is for it to be incorporated into the Rules of Criminal Procedure or Title 18 of the United States Code. In that way, the rule can be adopted through the legislative or rulemaking process, applied uniformly, and fashioned in a way that will minimize administrative burdens and difficulties in interpretation. In the meantime, however, there is no justification for appellate courts to impose that rule on the district courts just because they feel the rule would generally enhance the fairness of sentencing proceedings.

[15] If the Court rejects our submission and concludes that a district court must give notice of its intention to depart upward from the Guidelines range, it should require notice of downward departures as well. Petitioner concedes that the logic of his position requires notice in both cases, Pet. Br. 17 n.8, and the provision permitting appellate review of both upward and downward departures from the Guidelines range demonstrates Congress's intention to apply sentencing procedures even-handedly. See *United States* v. *Jagmohan*, No. 90-1045 (2d Cir. July 13, 1990), slip op. 5535 (extending "rule requiring prior notice to the defendant of a contemplated upward departure * * * to the context of a downward departure").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 1990

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* The Solicitor General is disqualified in this case.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 20112

No. 89-7260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM J. BURNS,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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ARGUMENT

I. WHETHER VIEWED AS MANDATED BY STATUTE OR BY PROCEDURAL DUE PROCESS, THE NOTICE THAT PETITIONER SEEKS: A) WILL BE NECESSARY ONLY IN A SMALL PERCENTAGE OF CASES; B) IS ESSENTIAL TO EFFECTUATE THE CONGRESSIONALLY-CREATED RIGHT TO COMMENT BEFORE SENTENCE IS IMPOSED; AND C) WILL NOT BE BURDENSOME FOR LOWER FEDERAL COURTS TO ADMINISTER

The Government asserts that Rule 32(a)(1) of the Federal Rules of Criminal Procedure ("Rule 32(a)(1)") does not require notice because the language granting the defendant "an opportunity to comment upon . . . matters relating to the appropriate sentence" does not specifically state that the judge must give advance notice of a departure, and, therefore, the Court should not fashion a notice requirement. Respondent's Brief at 6. To support this contention, the Government overstates Burns' position by claiming that he argues that Rule 32(a)(1) requires a "pre-hearing statement of the court's reasons for its sentence." *Id.* at 13. In response to this distortion, the Government sounds the alarm that Burns' position would require a "wholesale revision in the way sentencing is conducted in this country." *Id.* at 6. The Government's fears are unfounded.

Burns is not asking this Court to impose a general requirement that the judge preview the sentence that he or she intends to impose. Rather, he argues that notice is required when the judge alone is aware that a departure is being considered. The judge only has to provide notice when he or she is considering a departure based upon grounds not identified either in the presentence investigation report ("PSI report") or by the parties.

This notice requirement does not have the broad ramifications that the Government claims it has. Con-

gress intended that "most cases [would] result in sentences within the guideline range . . . ." S. Rep. No. 225, 98th Cong., 1st Sess. 52, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3235 ("Senate Report"). The United States Sentencing Commission estimates that only 12.2% of all sentences involve departures. United States Sentencing Commission, *Annual Report* 47 (1989). Moreover, the probation officer is directed to include in the PSI report an explanation of any factors that *may* indicate that a departure is warranted. Fed. R. Crim. P. 32(c)(2)(B). Thus, considering that either the PSI report or the parties themselves should identify any grounds for departure, judges will be required to provide notice of a possible departure only in a relatively small number of cases.

The Government also repeatedly characterizes both Burns' statutory and due process arguments as requiring this Court to engraft a "notice and comment" requirement upon Rule 32(a)(1). *See, e.g.*, Respondent's Brief at 5, 15, 19. In a footnote, however, the Government acknowledges that Congress itself created the right to comment. *Id.* at 24 n.9. The Government's interpretation of the significance of the "comment" language is suspect, however, because it would needlessly render that language superfluous.[1]

The Government asserts that the "comment" language:

> was added to make clear that the defendant was entitled to address any points made in the probation officer's report; the reference to 'other matters relating to the appropriate sentence' was added to avoid

[1] This Court will try to give meaning to every word of a statute, and not render any provision superfluous. *Bell* v. *New Jersey*, 461 U.S. 773, 788-89 (1983); *Bowsher* v. *Merck & Co.*, 460 U.S. 824, 833 (1983).

> the possible inference that the right to comment was somehow *limited* to the contents of the probation officer's report.

Id. at 24 n.9 (emphasis in original). This rationale, however, fails to take into account Rule 32(c)(3)(A), which requires the court to give "the defendant and the defendant's counsel an opportunity to comment" on the PSI report. The language in Rule 32(a)(1), therefore, was not needed to make clear that the defendant was entitled to address points made in the PSI report. Rather, the language of subdivision (a)(1) could only have been intended to emphasize the defendant's right to comment on matters related to the appropriate sentence that were *not* raised in the PSI report. Burns' interpretation of Rule 32(a)(1), shared by the overwhelming majority of the courts of appeals,[2] is the only reading that gives effect to each word in the statute.[3]

[2] *See* Petitioner's Brief at 12-13 n.4. The Government quibbles with petitioner's statement in footnote 4 of his brief that the First Circuit has recognized an implied right to notice of a departure from the Guidelines in *United States* v. *Hernandez*, 896 F.2d 642 (1st Cir. 1990). Respondent's Brief at 18 n.8. In *Hernandez*, the court stated that "a criminal defendant must have notice of any facts that will affect his sentence and a meaningful opportunity to respond . . . ." *Hernandez*, 896 F.2d at 644. In *Hernandez*, this opportunity to respond was provided by the trial judge when he invited counsel to comment on whether a departure would be appropriate. *Id.* at 643-44. Moreover, both the Eighth Circuit and the Fifth Circuit have interpreted *Hernandez* to require that the defendant must have either notice of the factors that may support departure or an opportunity to contest the departure decision. *United States* v. *George*, No. 89-7119 (5th Cir. Sept. 5, 1990) (1990 WL 126637, at 10) (to be reported at 911 F.2d 1028); *United States* v. *Sands*, 908 F.2d 304, 306 (8th Cir. 1990).

[3] In its analysis of the legislative history, the Government claims that Congress did not intend appellate courts to undermine the discretion of sentencing judges by "imposing procedural burdens that

Next, predicting "procedural chaos," the Government posits that a notice requirement in departure cases will generate "[e]xtended litigation" and burden the courts with "the task of fashioning an uncodified body of sentencing rules . . . ." Respondent's Brief at 25-26. These concerns are belied by the fact that there has not been a deluge of procedural problems in those circuits that have recognized the notice requirement.[4] Because the Government is a party in all federal sentencing cases, it presumably would be aware of any "procedural chaos" occurring in the district courts in those circuits. The Government's inability to point to any concrete examples of problems arising from the notice requirement is substantial evidence that no such problems exist.[5]

The first procedural quandary posed by the Government is "whether . . . notice is required before downward departures." Respondent's Brief at 25. That issue is readily answered by the plain language of Rule 32(a)(1), which gives "[t]he attorney for the Government . . . an equiv-

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Congress did *not* require." Respondent's Brief at 21 (emphasis in original). Again, this argument is based on the false premise that Congress did not mandate a "comment" provision in Rule 32(a)(1).

[4] The Second, Fifth and Ninth Circuits have all recognized the notice requirement since mid-1989 or earlier. *See United States* v. *Cervantes*, 878 F.2d 50, 55-56 (2d Cir. 1989); *United States* v. *Nuno-Para*, 877 F.2d 1409, 1415 (9th Cir. 1989); *United States* v. *Otero*, 868 F.2d 1412, 1415 (5th Cir. 1989).

[5] The Government's concern over "procedural chaos" has not prevented it from appealing the district court's failure to give notice of a downward departure on at least two occasions. *United States* v. *Jagmohan*, 909 F.2d 61, 63 (2d Cir. 1990); *United States* v. *Goff*, 907 F.2d 1441, 1446 n.4 (4th Cir. 1990). The decision to file these appeals under the Guidelines required the approval of either the Solicitor General or the Attorney General. 18 U.S.C. § 3742(b) (1988).

alent opportunity to speak to the court." Therefore, the parties have an equal entitlement to notice of this type. *United States* v. *Jagmohan*, 909 F.2d 61, 63 (2d Cir. 1990) (extending notice rule to Government in context of downward departure).

Second, the Government claims that it would be difficult to determine what matters would be subject to the notice requirement. It then reproaches Burns for suggesting that notice could be limited to "matter[s] critical to the sentencing process." Respondent's Brief at 25. Burns offered no such limitation and the quote is taken entirely out of context. Petitioner's Brief at 8. Rule 32(a)(1) plainly states that the parties must be given an opportunity to comment upon "other matters relating to the appropriate sentence." This language is comprehensive and unambiguous, and federal judges will experience little difficulty determining whether they must alert the parties to such matters.

Moreover, other than cases involving unexpected departures, few situations will arise where the parties legitimately can claim that they were deprived of notice. The Government expresses concern that Rule 32 might be interpreted to require notice of factors not contained in the PSI report, but which influence the judge to impose a sentence at the high end of the applicable guideline range. This situation is unlikely to occur. Generally, the factors that influence the sentencing decision are the same factors that determine the appropriate guideline range. *See generally* United States Sentencing Commission, *Guidelines Manual*, ch. 1-3 (1988); Petitioner's Brief at 5 n.2. Under Rule 32, the parties actively participate in the factual analyses that determine the correct guideline range. Rule 32(c)(3); Petitioner's Brief at 17-18. The parties, therefore, are necessarily on notice of the facts used

to determine the applicable guideline range, and, if the judge sentences within that range, the potential for surprise is remote, even if the sentence imposed is at the high end of the range.

The dearth of case law in this area suggests that requiring notice of a possible departure will not lead to a more general rule that judges must give advance notice of the factors influencing a sentence at the high end of the applicable guideline range. In the only reported case on point, the Sixth Circuit, which later held that notice was required in the departure context,[6] rejected a claim that the defendant needed notice that the judge considered 92.9% pure cocaine to be unusually pure before imposing sentence within the guideline range. *United States* v. *Ford*, 889 F.2d 1570, 1572 (6th Cir. 1989).

The third concern raised by the Government is how courts will determine when notice of a possible departure must be given. Respondent's Brief at 25-26. No circuit has concluded that notice of a possible departure necessarily must be given in advance of the sentencing hearing. Rather, the courts have held that notice and an opportunity to comment must be given prior to the imposition of sentence.[7] Giving notice in advance of the hearing would

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[6] *United States* v. *Anders*, 899 F.2d 570, 576-77 (6th Cir. 1990).

[7] *See, e.g., George*, 1990 WL 126637, at 8-10 (to be reported at 911 F.2d 1028) (rejecting claim that the requirements of Rule 32(a)(1) were not satisfied because notice was not given prior to hearing); *United States* v. *Hedberg*, 902 F.2d 1427, 1428 (9th Cir. 1990) ("To satisfy the notice requirement, it is not necessary that the defendant be notified by the trial court of the possibility of an upward departure *prior* to the sentencing hearing.") (emphasis in original); *United States* v. *Williams*, 901 F.2d 1394, 1400 (7th Cir.), *petition for cert. filed*, (U.S. Oct. 1, 1990) (No. 90-5849) (Rule 32(a)(1) satisfied by identification of grounds for departure in "presentence report, *or* by the sentencing court at the defendant's sentencing hearing") (emphasis in original).

be the better practice, but notice given at the hearing would not necessarily deprive the parties of the right to comment.[8] Moreover, the risk that postponement may be necessary if notice is given at the hearing will encourage judges to give advance notice whenever possible. In any event, that risk is outweighed by the court's interest in hearing relevant information and prepared argument from counsel. United States Sentencing Commission, *Guidelines Manual*, §6A1.3 (1988). Also, because the Guidelines require judges to announce the specific reasons supporting a departure decision,[9] it is highly unlikely that the judge will initially consider a departure at the sentencing hearing;[10] therefore, it should not be burdensome to alert counsel to the possibility of departure in advance of the hearing.

Finally, the Government worries that "[t]he specificity of the notice would also be subject to dispute." Respondent's Brief at 26. On the contrary, the courts of appeals that have addressed this issue have had no difficulty deter-

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[8] Petitioner strongly disagrees with the Government's claim that notice at the hearing will be of little value. Respondent's Brief at 13. Any opportunity to address the departure issue is critical to the interest of the defendant. Moreover, this Court should not assume that a postponement would be inevitable if the notice is given at the hearing. The need to postpone the proceeding would be determined on a case-by-case basis.

[9] Sentencing judges are required "at the time of sentencing . . . [to] state in open court . . . (2) . . . the specific reason for the imposition of a sentence" outside the guideline range. 18 U.S.C. §3553(c). The Guidelines thus compel judges to isolate and articulate the reasons supporting departure.

[10] In this case, the district court's production, less than two hours after the sentencing hearing, of a four-and-one-half page typewritten memorandum listing the reasons for departure indicates that the judge had made a tentative decision to depart well before the sentencing hearing. J.A. 63, 70-73.

mining whether the defendant was reasonably on notice of the departure. *See* Petitioner's Brief at 12-13 n.4. In sum, the Government's concern about the supposed difficulties involved in determining when and how notice must be given in departure cases is unfounded.

II. THE SENTENCING REFORM ACT OF 1984 CREATED A FEDERAL STATUTORY SENTENCING SCHEME PROFOUNDLY DIFFERENT FROM THE HIGHLY DISCRETIONARY SCHEME IT REPLACED. THE NEW SCHEME CREATES PROTECTIBLE INTERESTS IN THE MANNER IN WHICH SENTENCE IS IMPOSED AND THE LENGTH OF THE SENTENCE; THESE INTERESTS CANNOT BE SAFEGUARDED ADEQUATELY IF THE DEFENDANT IS NOT NOTIFIED BEFORE SENTENCE IS IMPOSED THAT A JUDGE IS CONSIDERING A DEPARTURE FROM THE GUIDELINE RANGE

The Government claims that "Congress's enactment of a guidelines sentencing system does not change the due process calculus," and that petitioner's claim is "no different in principle from one directed to an unexpectedly harsh but legal sentence imposed by a district court before the Guidelines took effect . . . ." Respondent's Brief at 10. The Government has chosen an appropriate pre-guideline comparison, but that comparison reveals profound differences in pre-guideline and post-guideline practice.

Before the Guidelines were implemented, the trial judge exercised almost unlimited discretion when imposing sentence. *United States* v. *Urrego-Linares*, 879 F.2d 1234, 1238 (4th Cir.), *cert. denied*, 110 S. Ct. 346 (1989) (Wilkins, J.) ("[B]efore guideline sentencing a court intuitively fashioned what it considered an appropriate sentence and did so without any obligation to give reasons

and many times without ultimate resolution of disputed facts."). Generally, the length of the sentence imposed was not subject to any appellate review if the sentence was within statutory limits. *United States* v. *Tucker*, 404 U.S. 443, 446-47 (1972). Thus, under pre-guideline practice, the defendant in the Government's example entered the sentencing hearing with no indication of what the sentence would be (other than the statutory limits), and the judge was under no obligation to justify his or her decision. No matter how unexpectedly harsh the sentence, the result generally was unreviewable on appeal. *Id.* at 447.

The Guidelines were designed to alter this situation substantially. *Urrego-Linares*, 879 F.2d at 1238. Rule 32 now mandates that the defendant will be afforded the following procedural rights: 1) advance notice of the critical findings in the PSI report; 2) an opportunity to challenge the accuracy of those findings; 3) the right to introduce relevant evidence; and 4) the right to have the court make express findings of fact on important contested issues. Rule 32(c)(3)(A), (D).

The Sentencing Reform Act now requires the district court to consider imposing a sentence consistent with the guideline range and consistent with pertinent policy statements established by the Sentencing Commission. 18 U.S.C. § 3553(a)(4), (5). Judicial discretion is limited to the range mandated by the Guidelines unless a departure is justified because "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission . . . ." *Id.* § 3553(b). A decision to depart must be supported by "specific" reasons for the departure which must be stated in open court, *id.* § 3553(c)(2), and Congress intended that "most cases

[would] result in sentences within the guideline range," Senate Report at 52. The defendant has a right to appeal the sentence imposed, and the court of appeals must reverse unreasonable departures from the guideline sentencing range. § 3742(a), (f)(2).

Thus, by enacting the Guidelines, Congress has changed the due process calculus. It created a protectible expectation that: 1) the defendant will be sentenced within the applicable guideline range, except in unusual circumstances where a departure is justified; 2) the district judge will consider the PSI report in imposing sentence; and 3) the defendant will be afforded the right to comment on any relevant sentencing factors. Congress was not obligated to create these expectations, but having done so, a defendant cannot be deprived of his or her liberty interest without due process of law. *Greenholtz* v. *Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 12 (1979) (holding that a state statute created a protectible expectation of parole);[11] *Wolff* v. *McDonnell*, 418 U.S. 539, 557 (1974) ("the State having created the right to

[11] *Greenholtz* also holds that whether a statute or rule "provides a protectible entitlement must be decided on a case-by-case basis." 442 U.S. at 12. Thus, the Government's fear that petitioner's notice requirement would "cast constitutional doubts over [state] sentencing proceedings" is misplaced. Respondent's Brief at 15. Only those states with sentencing procedures that incorporate the same guideline requirements that Congress enacted would be affected by a ruling favorable to the petitioner. Respondent cites to no such sentencing schemes.

For similar reasons, the recognition that guideline sentencing must include notice of a possible departure has no broader application to other federal rules despite the Government's assertion to the contrary. *Id.* at 16 (referring to Rule 23(c) of the Federal Rules of Criminal Procedure and Rule 52 of the Federal Rules of Civil Procedure).

good time [credit] and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced" within the Due Process Clause).

The Government claims that even if the due process analysis is different under the Guidelines, the notice requested here is not a necessary ingredient of due process under the test announced in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). First, it argues that there is little risk of an erroneous deprivation of the defendant's interests because there are many other procedural protections provided by the Guidelines. Respondent's Brief at 12. Without any notice that departure is under consideration, however, these procedures do not protect the defendant's substantial interest in commenting on whether a departure from the guideline range is either permissible or appropriate.[12] Nor do the procedures provide a meaningful substitute for this protection.[13]

[12] The Government suggests that notice could not have been very important because, upon imposition of sentence, defense counsel addressed the court's order that Burns be taken into custody without mentioning the lack of notice of the departure. Respondent's Brief at 4, 23. This argument is not well taken. The district court foreclosed any discussion or objection to the sentence she imposed by directing Burns to "step back with the Marshal" immediately after she advised Burns of his right of appeal. J.A. 57. Counsel's failure to address the notice issue resulted from the fact that the judge had moved on to decide the next issue—when the sentence would commence.

[13] The Government's claim that notice was unnecessary in this case because Burns' counsel in fact made appropriate arguments regarding departure is incorrect. Respondent's Brief at 13. As the transcript of the sentencing hearing shows, counsel's argument was virtually irrelevant to the technical departure issues that concerned the judge. *Compare* J.A. 40-45 *with* J.A. 70-73.

The value to the defendant of notice of a departure is much greater than the Government is willing to acknowledge. When the Government argues that petitioner only seeks advance notice to "alert defense counsel to appeal [] more generally to the judge's discretion not to make an upward departure or to make at most only a slight departure," Respondent's Brief at 13, the Government seriously misperceives the reasoning in *United States* v. *Kim*, 896 F.2d 678, 681 (2d Cir. 1990). *Kim* points out that counsel's legal strategy at the sentencing hearing will be "quite different[]" if counsel knows that an upward departure is contemplated, *id.*; this knowledge will allow counsel to focus on the technical issues that control the departure decision. *See* Petitioner's Brief at 30-31.

Ultimately, the amount of process that is due depends on what process is needed to minimize the risk of error. *Greenholtz*, 442 U.S. at 12-13 (citing *Mathews*, 424 U.S. at 335). Only with notice can the parties provide the type of input in the sentencing decision that Congress deemed essential to minimize the risk that inappropriate sentences would be imposed. Thus, when the judge alone has recognized a basis for departure from the guideline range, due process requires that he or she notify the parties of that possibility. *See United States* v. *Sanchez*, 908 F.2d 1443, 1446 (9th Cir. 1990) ("Because a defendant is accorded an adequate opportunity to assist the district court in arriving at its sentencing decision [including receiving notice of factors which were not identified in the PSI report as possible grounds for departure], the Sentencing Guidelines are procedurally sufficient to survive due process scrutiny under the balancing test of *Mathews* v. *Eldridge*"); *United States* v. *Brittman*, 872 F.2d 827, 828 (8th Cir.), *cert. denied*, 110 S. Ct. 184 (1989) (denying defendant "an appropriate opportunity to contest the

facts bearing upon the various predicate factors that the Guidelines make relevant to sentencing" may violate due process).

CONCLUSION

For the foregoing reasons, as well as those stated in petitioner's opening brief, the decision of the court of appeals should be reversed.

Respectfully submitted,

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